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CENTRALIZATION AND THE LAW

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CENTRALIZATION AND THE LAW

SCIENTIFIC LEGAL EDUCATION

AN ILLUSTRATION

WITH AN INTRODUCTION
BY
MELVILLE M. BIGELOW
DEAN OF THE BOSTON UNIVERSITY LAW SCHOOL

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1906

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PREFACE

THE following lectures were delivered on various recent occasions before the students or the Faculty of the Boston University Law School, as part of the plan of legal extension now on foot there — a plan which supplements traditional lines of legal education.

These lectures turn on three words, Equality, Inequality, and Administration ; the first as the dominant force in American life during the late ' classical ' period of the law; the second as representing the present condition of society; the third as the supreme aim of legal and of all education intended to fit men to engage in the affairs of the day. The Introduction outlines these ideas, in advance of the detailed examination in the lectures.

The conception of law which the Faculty of the Boston University Law School stand for is that the law is the expression, more or less deflected by opposition, of the dominant force in society. According to this view, society and, with it, the law stand as upon a pivot affected by gravitation. In the classical state of equilibrium we have equality; when that is changed, as lately it has been, we have inequality, and society consequently tottering in its first foothold. This

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change too may come in the end to equilibrium — a state of inequality as the dominant force in society.

It follows from the view that law is the resultant of actual, conflicting forces in society, that the notion of abstract, eternal principles as a governing power, with their author the external sovereign, must go. But if it be objected that these pages would thus merely substitute another eternal principle for the one put aside, the answer is, that the Faculty represented in this book are merely pointing out a phenomenon, a fact, patent enough; a living fact, of all time indeed, which governs the decisions of courts and the acts of legislatures — which governs however, not as an abstract principle imposed from without, but as part of the very life of the State.

Examination of the action of our courts, made in these lectures, is to be understood accordingly. The courts are conceived to be influenced by dominant forces, not consciously or in any objectionable way, but as carried forward or backward, naturally and indeed rightly, by the force of gravity working in economic movements through society. There is a turning in our day at the pivot, recent cases furnishing their own illustration (see the Introduction, pp. 9–12, and Lecture II, pp. 121–126), and courts of justice are, to the eyes of those who speak in these pages, seen to move with the shifting centre of gravity. That is the general view taken in these

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lectures; beyond that no faintest suggestion in regard to the action of the courts is intended. The lectures take note merely of the action, or inaction, of forces in society.

Tros Tyriusque mihi nullo discrimine agetur.

The scientific spirit in legal education should be merely 'an Illustration'; it is only a phase, as the Introduction, with the help of the first lecture, seeks to point out, of sound education in Administration generally. If these pages should succeed in making good the illustration, the shaft shot from the long bow, as well as the one flying within the shorter range, will have found the mark.

M. M. B.

BOSTON UNIVERSITY LAW SCHOOL,
January 1, 1906.

NOTE

Three of the lectures here published have, by the courtesy of others, appeared in print before. The third one appeared in the Columbia Law Review for January, 1905; the fourth in The Green Bag for the same month; and the sixth in Mr. Haines's Restrictive Railway Legislation (as Chapter VII), published by The Macmillan Company.

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ANALYSIS

THE Introduction in brief, and the first and second lectures in detail, point out certain social phenomena from which municipal law emerges as a resultant.

What should constitute legal education, with its methods and aims, arising from these phenomena and their resultant, is incident to the discussion.

But before the question of legal education can be entirely disposed of, it becomes necessary to clear the way for a sound, working definition of the term law; this in view especially of the fact that the current definition stands directly across what is here maintained as the true idea of law. The third lecture is directed to the purpose.

That done, the way is prepared for a consideration of scientific method in law and education, which is the subject of the fourth and fifth lectures.

All this involves a certain extension in legal education beyond anything heretofore undertaken; and the book accordingly closes with a lecture presenting an object-lesson in such extension.

The first two and the fourth lectures are complementary; the first two deal largely with social history, the fourth largely with legal history; the first two find the new law of to-day emerging from the conflicts of present or recent social forces, the fourth finds existing legal anomalies the resultant of past and spent social forces.

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CENTRALIZATION AND THE LAW

INTRODUCTION

THE EXTENSION OF LEGAL EDUCATION

THE American law of the twentieth century, as an inheritance of the nineteenth, is the final outcome, through processes of social, economic, and political conflicts and changes, of a state of practical equality of dealing and of access to the opportunities of life. Apart from slavery and the condition of the dependent classes, society had been established on that basis long enough to compel the law, as the servant of dominant influences, to catch up with it and deal with men accordingly; and so the law of the nineteenth century, sometimes called the 'classical' age of the common law, was made, or adopted from England where similar conditions on the whole obtained, to preserve such equality, and did preserve it except as slight restrictions of the tariff affected matters. Accordingly then, during this whole period of equality, the law, being level and because it was level with the pursuits of the people, was sufficient to maintain the

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substance of order throughout the land. Society at the centre of gravity, and hence the law, was in a state of equality.

It does not follow — if it did follow, the facts would contradict the inference — that the law worked satisfactorily in all respects even in such conditions of society, for no insignificant part of the law of the nineteenth century was an inheritance of preceding centuries and their social conditions. The law is necessarily a continuous stream from past times, down which to our own day survivals of other social states and the wreckage of other times have floated. To change the figure, the law is handicapped in all its branches with historical survivals. The lawgiver will not put these aside when he can, and often finds it impossible to put them aside when he would. The law as we have it is indeed for us to-day — it is our own law; but it has been made for us to no small extent by other men, living under conditions differing from those under which we live.

Still this law is for us in our own day, and it should be constantly laying aside the grave-clothes of a dead past. For the rest, it stands and will stand so long as it is adapted to the purpose of maintaining the order for which it was intended. But that is all that, judging from the past, can safely be said. It will doubtless be equal to maintaining order in the common affairs of life, even in the presence of powers

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contending for mastery over the old order. But this fact must not be accounted for on mistaken grounds. It is common to talk about the 'principles' of the law, as if there were something in the law which is by nature for all time. That idea is disposed of in one of the lectures which follow this Introduction. The Law Schools should shake themselves clear of it and of its author the external sovereign; there are no principles of the kind. Principles there may be and are in the secondary sense that there are propositions which are wider than and underlie particular rules of law; but these so-called principles are, like the rules based upon them, only the resultant of conflicting forces in society, and are accordingly for their own day. The legal principles of the time of Marshall, the equitable principles of the time of Kent, were adopted as suitable for the dominant day of equality; they were intended to preserve equality, and were sufficient for the purpose so long as no organized, general movement was afoot breaking it down. But during this very period economic changes took place on a scale great enough to make the first third of the nineteenth century pass for ancient history before the second third had disappeared. The principles of law and equity of the early nineteenth century found themselves, within a single generation, in surroundings never dreamed of, much less calculated for, when they were laid down. Such changes

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must have and did have their own counterpart, however tardy, in the law. It is a mistake to look upon the jurisprudence of a people of one age as an expression of principles for the people of another. It should be a perilous thing to found or deny a right upon authority of another age; to be justified, if at all, by clear evidence that the conditions relating to the question then and now are substantially the same, otherwise it is in reality a recognition of the doctrine of abstract principles. Outworn precedents should give place to law of the living age; the process of elimination, displacement, and replacement should be going on all the time; the scientific spirit should control the situation. Only thus can the law play its proper part in the movements of life.

The economic, social, and political changes of the nineteenth century took place at first, and continued for a considerable time, without seriously affecting equality, and the law had only to adjust itself by normal and natural methods to the situation, however great a change the new conditions required. But as the century advanced towards its close the situation was manifestly and rapidly changing in its very nature. The centre of equilibrium was turning on the pivot; equality was going — before the end of the century it had gone. Inequality extended over the whole country.

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Inequality appears in two aspects, namely, between capital and the public, and between capital and labor.

In the first aspect combinations of capital have everywhere entered the field and disturbed the old order, and the twentieth century finds the change going on with accelerated pace. Prices of the commodities of life are raised at will, where under former social conditions they were regulated generally by the natural incidents of supply and demand and the course of trade. Improving the opportunity afforded by the tariff laws, differentials fixed by the railways make a cul de sac of territory larger than England, within which prices, established by power working with the railways, are raised to a point which seriously affects the people. Smaller areas are equally within the control of power; every commercial town whose railway terminals are owned by a combination is supplied with commodities at the will of those in command; indeed whether the commodity is to be had at all is determined in the same way. This of course goes to the initial stage of all dealing, the law beginning to operate only after bargains are made or after the doors of opportunity are forced open.

This then is the situation between the public and capital: Equality and Inequality touching the very necessaries and conveniences of life, and so the most powerful forces of society, are contending for su-

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premacy. The situation itself is enough to confound all notions of abstract principles and to indicate how the law is made. The dominant force, if it maintains itself long enough, always imposes its tenets, modified somewhat by the contest itself,[1] upon society — that of course is the very meaning of dominant force — and courts and legislatures, however reluctant, must sooner or later yield, or refusing run the risk of war.

In the present contest, as matters stand to-day, equality is fighting empty-handed; its weapons were not made for the business. The law of Marshall and Kent, with all the modifications and accretions since their time — the weapons are still the old ones — is powerless, as every one must see, against the skilful equipment of inequality. And the difficulty is made the worse for equality by the fact that competition is one of its own favorites, as matter of legal right; for competition, unrestrained, leads to monopoly and so to inequality.

These pages will not take sides in the trial of strength; in the teaching of law as such it must always be a matter of indifference which side prevails. The law must be taught, whatever it is. Still it is a proper question to ask, how equality is to face the contest with hope of success. Upon that question this may safely be said, that whatever means are adopted, nothing short of the scientific precision, let

[1] Law merchant affords striking illustrations.

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us say, of the Standard Oil Company, as perhaps the embodiment of the new order, added to power of the highest kind, can have the smallest hope of success. The winning order, whichever may prevail, must be the most perfect embodiment of skill and power.

It may be well, in considering that question, to see how equality regards itself. The noticeable and important fact on that point is the growing conception of the public as a distinct entity having rights. It is the public of course which stands for equality. The existence of the public, in this view of the matter, furnishes the means by which combinations enrich themselves. The existence of the public is accordingly an asset, in the nature of property, which the public may refuse to part with. This may be open in competition, upon reasonable terms, to the use of corporations as well as of individuals, the ownership remaining in the public. It should not be possible, so runs the case of equality, for corporations or individuals to make an unjust use of this public asset — unjust in the sense of making the conditions of life harder for the use than they would otherwise be, in other words, in the sense of destroying equality. This view rests upon the idea that the public, in those who compose it, has the right to live and to have, and to do what is reasonable, within admitted limitations.

But the statement of right is only an appeal; it is not war, it is only preamble; the old order still is

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not equipped for the contest. The law of damages is an idle remedy; the criminal law and even the injunction fail. The combinations work beyond the reach of the law — beyond the reach of evidence. The prosecution cannot prove what every one knows; no one can testify to it. The proceedings are secret, no record is made, no letters are written; the combination refuses to prove its own existence, and the work goes on.

So far as equality seeks a remedy against capital, this must be found in legislation; whether in the adoption of some modification, in regard to these combinations in restraint of trade, of the Roman law of compulsory evidence, or of the federal government taking possession of the channels of commerce with power to impose adequate conditions, or federal regulation of rates in some effective way — whatever the method of restoring equality, it must be an addition to any aid furnished by existing law, and must be set on foot by legislation.

The second aspect of inequality is presented by capital and labor. The latter as well as the former in combinations is in effect an agency in monopoly. 'The attempt to force all laborers to combine in unions,' says the learned Chief Justice of Massachusetts, 'is against the policy of the law, because it aims at monopoly'; 'the unions, by a combination of those in different trades and occupations, would have com-

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plete and absolute control of all the industries of the country.'[1] Here is inequality against inequality.

The contest between capital and labor differs from that between capital and the public as the State in that its results have come more frequently before the courts for consideration. Judicial law here plays the part which legislation plays and must hereafter play still more in the other contest. For that reason the action of the conflicting forces, in their resultant, may not be so readily marked; but looking carefully at the phenomena, it will again be fairly evident that the courts are feeling the turn of the social equilibrium towards capital, that is, towards inequality. Let a recent line of decisions in Massachusetts be the evidence and the illustration.

The decisions begin with a case decided in the year 1871, and end with one decided last June. In the first of these cases it was in effect held to be unlawful for a combination of labor maliciously (in the sense of without lawful reason) to cause the discharge of a man from his employment, to his damage, though no breach of contract was caused or other wrongful act done.[2] This movement of the social equilibrium towards capital was indeed met by a series of dissents;[3] and finally a number of cases, not indeed

[1] Berry *v.* Donovan, 188 Mass. 353, 359.

[2] Walker *v.* Cronin, 107 Mass. 555.

[3] By Mr. Justice, later Chief Justice Holmes. See Vegelahn

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between capital and labor, but bearing directly upon the subject, attempted in effect to arrest the movement, declaring that malice was not of the essence of liability in actions for interfering with the freedom of contract, but that wrongful measures, such as misrepresentation or intimidation, were necessary.[1] This was in the year 1895 and again in 1898. It may be that capital and labor were not thought of in these cases; but they made for labor in effect, and so helped to turn back the tendency. Their day however was short. In the year 1900 the deflection in favor of capital returned, though with a divided court, the minority resisting on the ground that labor was only 'competing' in its attempt to defeat capital.[2] In June, 1905, the contest was settled by a unanimous court in favor of capital.[3] The dominating social

v. Guntner, 167 Mass. 92; Rice *v.* Albee, 164 Mass. 88; Plant *v.* Woods, 176 Mass. 492.

[1] Rice *v.* Albee, 164 Mass. 88; May *v.* Wood, 172 Mass. 11. Mr. Justice Holmes now found it necessary to dissent for a different reason, to wit, that maliciously to inflict damage was wrongful, as had been held in Walker *v.* Cronin, unless done in the exercise of some legal right, such as competition. Though Rice *v.* Albee and May *v.* Wood bore in favor of labor, they were in his view wrongly decided for the reason named.

[2] Plant *v.* Woods, 176 Mass. 492. See also Moran *v.* Dunphy, 177 Mass. 485 (1901).

[3] Berry *v.* Donovan, 188 Mass. 353, reviewing the decisions; among which see especially Quinn *v.* Leathem, 1901, A. C. 495.

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force, speaking through the judiciary, now finally, at least for the present, tears from labor one of its most cherished and effective weapons, to wit, the idea that power, combination for the contest, is competition. The unions are told by all the judges, without a shadow of dissent, that if combinations of labor for a malicious purpose were to be considered lawful, 'employers would be forced to yield to all their demands, or give up business.'[1]

The doctrine maintained in the year 1900, by the then Chief Justice (in dissent), that the use by labor of measures to strengthen itself against capital was within the meaning of competition, was swept off its feet. The contention that the means (combination) must be justifiable if the end (competition) is justifiable, would be sound if the means were not broader than the end; but the means may lead to intimidation and violence as naturally as to what is lawful, as experience shows.[2] But the more important point is, that

[1] Berry *v.* Donovan, supra, Knowlton C. J. at p. 359. It was held that the case was not one of competition, affirming Plant *v.* Woods, supra, against the dissent of the former Chief Justice, and limiting the meaning of the term competition. The plaintiff, a non-union man, had been discharged by his employer in accordance with a contract between the latter and a labor union, of which the defendant was representative. The employment was terminable at will.

[2] On the other hand, considering the reasoning perfect, logic led to an impasse. In any view of the subject one cannot too

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the reasoning of the Supreme Court is consistent with the social equilibrium as that has been tending, and hence is valid. It is dangerous in actual life to reason against gravitation, and courts which do so will be likely, in proportion to their influence and determination, to make trouble and disturb the peace. The Dred Scott Case is the sufficient example. Reasoning against slavery by the Court of South Carolina, before the civil war, would have been as bad and dangerous there as was reasoning in favor of it by the Court of Massachusetts here.

Here then, in both aspects of inequality, is work for the Law Schools. In virtue of the support which they receive from the public, and of the opportunity they have, they owe a duty to the public to help it in its time of need. The great questions of the day are mainly legal questions and call therefore for men of legal training on right lines — training on traditional lines alone will not do — to deal with them. This training should direct the student to the great forces

much admire the strength and the consistency of the argument throughout of the distinguished judge (Holmes) who upheld the losing side. The reason why that was the losing side was because the tendency of the social equilibrium was steadily the other way. That tendency may not be permanent; it may be turned back — no one can tell — and the argument which failed may be set up again and prevail.

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of social life, movement, and change which cause decisions of the courts and acts of the legislature. The Law Schools should endeavor to furnish men competent to give aid in solving all questions of legal right on the footing of the paramount cause.

There is a plain initial step towards that end, which cannot justly be neglected. The law should always be taught and held to be an Order, sufficient for maintaining justice under all circumstances. It is the duty of the Law Schools to make this the first postulate of law and to focus all their work upon it; and then they should help discover the wisest means of making the postulate good whenever existing instrumentalities fail. But that is not enough. Another thing, for old or new, should be added; the law should be taught as a consistent whole for all parts and interests of the State — the Order of a Cosmos, every part of it duly related to and in harmony with every other and the whole. It should be made clear that there can be no detached parts of the law; that to conceive of the law as made up of detachments loosely related to each other, as is too apt to be the case, would be the keynote of disintegration and anarchy. Against that all teaching must take its stand, whatever social force is or becomes dominant in the State.

It may not be possible to teach the whole body of the law in any Law School, but so far as the teaching goes the law should be taught, and the whole field of

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instruction farmed out and co-ordinated, upon the idea named. Indeed the very fact that the Law Schools may not be able to deal at length with all the law, domestic, external, and international, should make it all the more imperative for them to impress upon their students the precept that the law is an Order and a Cosmos. With the courses of instruction duly co-ordinated and focussed to that end, and the whole Faculty working to the common purpose, the Law School should make itself felt in the sound administration of order, and at the same time afford an object-lesson in that consummate part of life.

The extension in question of legal education has not however for its sole object the study of the contest between equality and inequality. The whole content of legal right, in whatever aspect or bearing, is proper subject for the work of the Law School. The field of legislation, heretofore treated as outside the domain of legal education, except for a few statutes closely related to the common law or to litigation, belongs as properly to the Law Schools as the unwritten law itself. The relative importance of legislation to common law, heretofore looked upon as small and hence negligible, is now rapidly changing, and no equipment of legal education should hereafter be regarded as satisfactory which ignores

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or overlooks the importance of the study of legislation. A great field of statute law will be opened for instruction in the Law Schools in the provision of measures in favor of equality. In all work of the kind, whether in the study of what already is law or of the process and steps of making it, the Law School should have a part; for all this relates immediately to the domain of legal rights, the whole of which should be within the general range of legal education.

A word further is necessary to guard against mistake concerning the proper sphere of law. The law must be equal to maintaining order — if equality becomes again the dominant force in society, its work will be chiefly to restrain business from encroaching upon rights according to the ideas of equality. But it is no function of law as law to regulate business. It is for men to find out their own pursuits and methods, not for the law, except as the effect of business becoming the dominant force in society, to do it for them. It is not for judges or legislatures to direct the course of the stock exchange, the chamber of commerce, the clearing-house, or any other of the agencies of life. Law-makers are seldom competent to teach business; they have not had the necessary training or the experience — they are not business men.

It would be turning away from the truth to say

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that this doctrine has always been acted upon, or is now recognized more than as a general theory. The courts do not always follow the customs of the exchange or the clearing-house; nor does legislation always follow business even where business is pursuing unquestioned methods. The result is confusion in important matters; the law interferes with proper pursuits, turning them usually into narrow and undesirable channels, to the defeat more or less of just ambition and endeavor.

To study the causes of this confusion, to study the means of removing it, to study the relations generally of business to law — all this is within the proper sphere of the Law School, and should make part of its work. Adequate means of help too are at hand. Men of business can and should be called into service in solving the difficulties, for they know from experience where the difficulties lie. The Law Schools may well take a leaf out of the life of Lord Mansfield as Chief Justice on that subject. Lombard Street did give the law to Westminster Hall, if in the teeth of reactionary judges like Lord Holt, by the direct action of modern judges like Lord Mansfield. Lord Mansfield appointed special, permanent jurors from the merchants of London to inform him and help in the adoption, into the law, of the customs of merchants and underwriters, and thus was enabled to complete the English law merchant. Merchants had

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confidence in the Chief Justice because he was guided by sound scientific method, and society was made the richer and the better for it.

If the foregoing remarks are well taken, the advance made a generation ago in the technic of legal education should now be followed by a general advance into the neglected fields of legal activity. To this wider aim the logic of events has for some years been pointing and drawing men. Legal education cannot see the old order passing away and giving place to conditions none of which were foreseen, some of which are everywhere in open and successful defiance of nineteenth century law, while the public is struggling towards wider legal rights — legal education cannot see all this and go on as if nothing had happened. The ever-changing field in which the law is to exercise its restraining power appeals to the Law Schools, far more than ever before, as a necessary part of legal education. 'Classical' definitions of law are mechanical, inflexible, instinct of the doctrine of abstract principles and external sovereigns; they were not sound for the nineteenth century — they will never do for the twentieth. The scientific spirit as the dynamite of efficiency in the man breathing it — in the Faculty as one man — is needed in the teaching as well as in the making of law. The law should be taught as a practical living thing of the

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living present, flexible and responsive to social and economic changes in life. The Law Schools should aim to fit their students to help provide for and administer in the most skilful way, whether in the courts or the legislature, through the press or otherwise, whatever in the affairs of our day pertains to the law.

Whether the dominant force in the State be equality or inequality, or something intermediate, the great word throughout is Administration; for after all, the law, if not itself business, is at any rate a chief factor in relation to it, and must always be reckoned with in the conduct of affairs. The whole matter indeed may be summed up by saying that the great legal-business problem is, how to administer the pursuits of men in relation to the law. To fit our students for this purpose all the energy and ability of the faculties of the Law Schools should be directed; administration should be the first and last word in legal education.

And the teaching of the Law Schools should help beyond. Legal administration is only a particular form of administration generally, which should be the chief aim of all the schools. To this wider problem of administration the pages of this book are intended to lead; the concrete case of education in the Law Schools, so far as it is directed by the scientific spirit

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to its practical aims, should be a case in point. Directed by that spirit to the immediate end sought for, and so compact of efficiency, the Law Schools should be part of the white light of the life and energy of the present day.

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LECTURE I

NATURE OF LAW: METHODS AND AIM OF LEGAL EDUCATION

I INCLINE to believe that certain scholastic conceptions concerning the law, which we have inherited from the past, tend to embarrass the sufficiently difficult task of compassing an effective modern legal education.

We usually conceive of legal principles as 'universals,' in the sense in which the word 'universal' was used by mediæval realists. That is to say, we consider legal principles as something real, existing as truths apart from the facts which make up the sum of human life. For example, we speak of 'justice' as an abstract thing, as it were an idea of an infinite mind, which was true before man lived, and would be true were man to perish. By parity of reasoning we are apt to view our corpus juris as based on a body of so-called 'principles,' which, I apprehend, in the last analysis we deduce from a first cause, called a sovereign, whether human or divine. Using these principles as premises, whose truth, in the main, we are precluded from questioning, we proceed to draw out our conclusions, reason-

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ing from the past to the present or the future, as though we were dealing with metaphysics.

I will explain by an illustration. On Sinai Moses received from God a code which he gave to the Jews written on tablets of stone. This code was a 'universal,' for it was an idea of the infinite mind, true for all time, and as capable of application in one age as in another. It was a real thing, created beyond the range of human experience, and existing independent of humanity.

Taking this supernatural command as a starting-point, the Levites soon spun out their ritual by deduction, basing their reasoning on tradition. The ritual thus derived was equally as true as the premises, and if man failed to conform thereto, the vice lay in man, and not in the law. The law rested in this case upon the command of a divine sovereign.

This conception of a sovereign will is represented with all the energy words can give in the civil law. The only difference is that in the civil law the Emperor's will replaced the will of God. Whatever the Emperor decreed was law, irrespective of time, place, or circumstances. The subject obeyed. 'Quod principi placuit, legis habet vigorem.' In the same way the Holy Catholic Church is the repository of a divine tradition, which is supposed to be a real thing, existing beyond the domain of the human mind. Now, although the English law does not purport to be

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divine, like the Mosaic dispensation or the Christian tradition, and does not recognize the existence of a single human mind as the source of law, external to the subject who obeys, as did the Roman, yet it operates upon a similar principle. The common law is, in theory, a body of immemorial customs which exist externally to those now living, but whose existence is proved by the judgments of the courts, in whose minds these customs are preserved, precisely as the divine tradition is preserved in the mind of the Church in its corporate capacity.

It would be folly to question that such theories are adapted to certain phases of civilization, since they have sufficed for ages; but it does not follow that because they have suited the past, they are convenient forms of instruction at present. In the same way modern physical science could hardly be taught upon the theories inculcated by Moses. Take an instance. Moses assumed that the sun moved round the earth in obedience to a divine command, that is to say, in obedience to the will of an external sovereign. Modern science demonstrates that the earth moves round the sun in an ellipse which is itself a resultant of two antagonistic forces.

Similar analogies should lead the modern jurist to dismiss as fanciful the notion that the law is the command of a sovereign external to the subject. On the contrary, the law *is the subject himself* in all his

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manifold complexity, for the law is the resultant of the conflict of forces which arises from the struggle for existence among men. Ultimately these forces become fused under the necessity of obtaining expression through a single mouthpiece, and that fusion, effected under this pressure, we call the will of the sovereign. It is however the will of a sovereign precisely in the sense that the earth's orbit, which is a resultant of the conflict between centrifugal and centripetal force, is the will of a sovereign. Both the law and the orbit are necessities, and the one and the other have a like relation to an abstract idea of right and justice.

Thus instruction in modern law should differ from the instruction which our ancestors received in law, as does instruction in modern physics from the mediæval instruction in metaphysics. Dun Scotus deduced from an ultimate universal, God, who was a reality, a series of lesser universals, likewise realities. Among these lesser universals were truth and justice, which were real things existing beyond human experience. The modern chemist observes isolated facts, and from several facts, so observed, attempts a generalization which he calls a law of nature. I apprehend that the modern instructor in law should follow the method of the modern chemist; he should reject so-called abstract principles and deal with concrete facts. In our time of transition, if we are to

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understand the phenomena of our law, or lack of law, we must first investigate the social system which generates the law.

To make this reasoning clear, I see no escape from attempting some slight sketch of the past, in order to explain the path I have trodden, and when you stand with me, we can go on to examine the present and the future. But, first of all, we must make sure of this matter of universals, for everything hinges upon that.

Blackstone did not hesitate to maintain that 'the law is the perfection of reason,' and Lord Coke dogmatically asserted, 'nihil quod est inconveniens est licitum.' Here we have the old doctrine in its purity. The universal of the law was a body of traditionary principles forming the perfection of wisdom, precisely like the Mosaic code. These principles, which were real things, were lodged in the bosom of the Court, and when expounded constituted justice, which was also a real thing. It was not permissible to argue against this abstraction, called justice, that it wrought hardship, for the postulate from which Lord Coke started was that no hardship is legal; therefore, if the suitor found the law unjust, the fault lay with the suitor and not with the law. The Church in the same way held that if man found the divine law hard, the vice lay with the man, not with the decree of Providence.

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In both Church and State it followed as of course, that, if you possessed as premises a body of perfect wisdom as a rule of conduct, in order to attain perfect results you had but to reason logically from those premises and apply your conclusions to the affairs of daily life.

You will see presently how even in a slow working society like that of the middle ages, this theory broke down in practice, just as it broke down with the Jews; but, prior to our own time, the movement of thought has not been so rapid that the adoption of such a doctrine in education vitiated the result. Another aspect of the problem is presented in modern civilization, which every few decades is torn from its past by the introduction of new mechanical forces. These forces are powerful enough to change the conditions under which competition is carried on, and thereby revolutionize the relations of daily life.

To keep pace with this movement we must learn to look on all institutions as tentative, and to do this in a calm and conservative spirit we must always bear in mind how law and institutions have been evolved.

If we go back to the eleventh century, we find a body of law in England which William the Conqueror is said to have promulgated, but with which, in truth, he had very little to do, for it was an effect of causes which, among other phenomena, produced William

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himself. The feudal system sprang from the economic necessities of mediæval Europe.

Any living organism to survive must defend itself, but in England, before the reign of Henry II, even a rudimentary standing army could hardly have been paid in cash, unless pillage may be called cash payment. The alternative was a territorial militia yielding rent in service, and thus arose the feudal tenures. The amount of land supposed to be necessary to support a horseman, technically termed a knight's fee, was the unit, though this unit varied in dimensions, and nobody ever knew the number of knight's fees.

No vigorous centralized judicial system could operate under these conditions, since the Sovereign could not enforce process against the owner of a fortress without an obedient force capable of breaching walls. Accordingly the feudal hierarchy sank into anarchy with Stephen. Men built castles where they pleased, which the Crown could not reduce. Order only came with the rise of a moneyed class. Under Henry II (1154–1189), the chief towns, such as London, York, Durham, Oxford, Norwich, and Exeter, attained a point of opulence where they could pay the King to defend them in the exercise of certain franchises which they found beneficial. They called these franchises exemptions from feudal servitudes, but they were in fact the rudiments of a system of law favorable to the commercial, and hostile to the martial class.

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The social revolution which began with Henry II culminated four hundred years later under Henry VIII, and every step in its progress can be followed in modifications of the abstraction called 'justice' with mathematical precision. Henry's reign marked the opening of the extraordinary industrial expansion which temporarily culminated about 1270, just before Edward I ascended the throne. When it began, in substance, no urban population existed, and no commercial law. When it ended, the urban population could hold its own against the baronage. The amount of wealth amassed may be measured by the expenditure on religious architecture, which was, it is true, the chief extravagance of the age.

In 1840 French architects estimated that between 1170 and 1270, that is, practically, between the pacification of England by Henry II and the coronation of Edward I, eighty cathedrals and five hundred churches were built in France alone, which could not have been replaced when the estimate was made for $1,000,000,000. But as money had at least tenfold the purchasing power in the thirteenth century that it has now, such an expansion changed the whole complexion of society and, among other things, justice.

The old common law sufficed for a rude, martial aristocracy, whose wants were confined to a stone tower, a suit of iron armor, and a band of spears; but it was quite inadequate for an opulent and splen-

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did civilization, represented by the magnificence of the Cathedral of Chartres and of the court of Saint Louis. Therefore, side by side with those archaic customs which the judges were supposed to remember and expound, there grew up new methods of managing property and regulating contracts.

Setting aside ecclesiastical law, which we may neglect, the law merchant, or what we call commercial law, came in with the merchants' guild, which usually administered it. The burghers, in their corporate capacity, were apt to buy of the feudal superior certain privileges and exemptions from customs, and to record their bargain in an instrument which, since it was in writing, they called a charter. One privilege was to hold their own courts. The town or guild courts thus established answered well enough, so far as the needs of the urban population were concerned, for dealings within the walls; but the local tribunal had a limited jurisdiction, and the common law gave little relief against a military class, who not only often defied process, but who could legitimately resort to trial by combat. The situation explains itself upon statement.

Soldiers are proverbially improvident, and a twelfth or thirteenth century soldier was perhaps the most improvident of all. Soldiers also are everywhere bad pay if allowed to run into debt. But a baron about the time of Richard Cœur de Lion stood in urgent

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need of money. Fashion demanded that he should go to the crusades, which was ruinous; in war, if captured, he must pay ransom; even if he remained at home and in peace, he must frequent tournaments in gorgeous armor, and at all events keep up a retinue which would command respect. Nevertheless the baron had no cash, save what he could borrow or take by robbery, and accordingly, if luck failed him in the wars and he took no prisoners whom he could ransom, he would ride to London or York or Exeter, and try to borrow of the Jews. His security would be of the worst. His land was likely enough his only collateral, and his fief may have been inalienable. Even if he held a fee simple, he could contest a claimant's title, on breach of the condition of his pledge, by judicial duel. The worthlessness of his bond is proved by the rate of interest exacted, which approximated fifty per cent a year.

Sometimes the usurers would refuse accommodation, and then they feared capture and torture. At the opening of each crusade the pressure to borrow was greatest, the extortion severest, and bloody catastrophes often occurred. In July, 1190, Richard I started for Palestine; the preparations had been immense and costly, enormous debts had been contracted, and to clear the account a general massacre of Jews was begun on the day of his coronation, September 3, 1189. The onslaught spread throughout

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England, and culminated in a wholesale butchery in the Castle of York. There five hundred men with all their women and children were slaughtered, and the bonds of their debtors, which they had deposited in the Cathedral for safety, were burnt on the floor of the nave.

Furthermore, beside the money-lenders and the merchants who asked and were ready to pay for protection, there were, as accumulations multiplied, the non-combatants, such as women and children, to be provided for. With land in an entail which could not be broken, the tenant for life left his wife and unmarried daughters destitute, save for the dower, in her enjoyment of which the widow could be seriously molested by the heir.

Therefore it is plain that, once society had reached the point where the accretion of wealth caused complex relations, a central power of some sort became inevitable, maintained by the money of those who had grown rich, which should have the energy to coerce a debtor, to protect the unarmed man from the armed man, and to take charge of the property of women and children. That is to say, economic power sought and found expression, through the Sovereign, in writs of mandamus and of injunction issued by prerogative courts, and in machinery for administering trusts.

From the accession of Henry II onward for several centuries the evolution, though perhaps slow, was

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regular, keeping pace with the rise of the business class as distinguished from the martial class. The first phenomenon was the development of an energetic executive largely by what we should call the sale of justice, or by the sale of privileges relating to the administration of justice. The traders began by the abolition of the archaic law in the towns, and by the purchase of exemptions from feudal customs, and the right to erect local tribunals. Then contracts were made with the Sovereign for general process. The Jews and others went to the King, either with presents, as in 1189, wherewith to buy protection from violence, or else with a bond, the obligation of which had been broken. In the first instance the King did what he could, sometimes, as at York where the sheriff was with the mob, little enough; and in the second he took the bond, and charged half of what he extracted from the debtor for his trouble.

For possibly a century after the accession of Henry II the procedure seems to have been very irregular. The judges were not so much professional lawyers as administrative officers whom the King removed for disobedience or perhaps for less avowable reasons. If the King wanted a writ for any special purpose he ordered one to his liking, as he might have ordered a pair of shoes, and a clerk in chancery wrote it, and the judge made a decree to fit it, and it was sent down to the sheriff to execute if he chose, or

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possibly to leave unexecuted. As a matter of fact, Cœur de Lion had much trouble with his sheriffs, and was constantly dismissing them and selling their offices to others. Indeed, under Richard, it would appear as if the sheriffs did much as they pleased, provided in some way they could show that the Crown would be indemnified.

Of course the barons protested vigorously, for, if justice could be sold to the highest bidder, their days were numbered. In 1215, in Magna Charta, they made John promise that he would do so no more, and in 1244, a generation later, they raised a great outcry, insisting that the kingdom must be served by an honest chancellor who would sell no new writs, but would adhere to ancient usage. Notwithstanding which, the volume of business swelled, and as its value rose, trained men handled it. By the middle of the thirteenth century the judges formed a class apart, and as they became specialized and held office by a more stable tenure, they tended to follow precedents instead of obeying orders, falling more and more under the influence of the great magnates of their time, as judges will.

So redress in causes involving new issues grew harder and harder to obtain, until Edward I began to complain that he could not get his work done. Finally Parliament undertook to provide a remedy through the common law courts by the Statute of

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Westminster the Second, which provided that new writs might be issued to suit circumstances. Apparently the landed gentry were still too strong for the King and the men of business in Westminster Hall, for the judges would have nothing to say to the new statute, and the grievance remained unredressed. Thereupon the Crown abandoned the attempt to ameliorate the law through the regular channels, and went straight to its end by causing various committees of the Privy Council to hear suits. The Privy Councillors could, of course, be depended upon to do what they were told, and thus rose to fortune the celebrated prerogative courts.

The most effective innovation of these tribunals was the writ of subpœna. This writ was devised by John Waltham, who became Keeper of the Privy Seal in 1386, and who previously, when a subordinate under Edward III, is said to have conceived the idea of issuing an order to a person complained of to appear, under a penalty for default; the penalty to be enforced summarily. As the writ could be bought for 6*d*. and as the penalty was substantial, the privileged classes felt the Constitution to be in peril, and a long agitation ensued. Whenever the gentry could control the House of Commons, they petitioned against the prerogative courts, and clamored for a return to the common law. The following is an example of such a petition, drawn in 1415.

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It set forth that 'as divers of your realm feel themselves greatly grieved, because of your writs called writs sub pœna and certis de causis, made and sued out of your Chancery and Exchequer concerning matters determinable by your common law, which never were granted nor used before the time of the late King Richard; that John Waltham, late bishop of Salsbury, of his subtlety caused such novelty to be found and commenced against the form of the common law of your realm.' Notwithstanding the outcry, however, the sale of the subpœna went on, and you may read for yourselves how fifty years later Guy Fairfax, a judge of the King's Bench, a good lawyer and an intelligent man, scolded his brethren for letting the lucrative litigation go to the Council because they were too dull to use the subpœna also.

Thus the Chancellor, the direct mouthpiece of the Sovereign, became ultimately the vent through which the energy of the growing power of capital found expression in relation to civil business, while the Star Chamber, a committee of the Council, established a criminal jurisdiction equally important to non-combatants. To insure the supremacy of the economic intelligence, physical force had to be eliminated as an element in competition, and the rising moneyed oligarchy used the Star Chamber to crush the martial oligarchy.

This, if I mistake not, is the process by which what

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we call the principles of modern English law have been evolved; and you see that, in the abstract, right and justice, as something beyond social convenience or, if you please, class advantage, are figments of the imagination. What you have, as a scientific fact, is an automatic conflict of forces reaching, along the paths of least resistance, a result favorable to the dominant energy.

At the outset you find champions settling their differences by duel or by private war. Subsequently a new form of intelligence appears, using money as a weapon. The moneyed men buy exemption from the feudal customs which favor the soldier, and establish courts to favor themselves, whose decrees are enforced by a hired police. They next fee the King to coerce debtors; then they seize the government and rob and slay their competitors, as previously their competitors robbed and slew them. To us, from the educational standpoint, this development is chiefly interesting because it kept the body of the common law small.

At best the corpus juris of a relatively simple civilization, like the mediæval, was narrow; but even so, expansion along the lines of least resistance split it into fragments. Because the merchants found the established judiciary inflexible, they administered commercial law themselves, and because the King afterward found the same judiciary reactionary, he

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collected debts and protected trusts through more docile tribunals. Similar obstructions in criminal procedure caused the two Henrys in the sixteenth century to destroy the old nobility through the Star Chamber, whose precedents left a deep imprint upon prosecutions in later times.

Thus, as society expanded, it evolved new legal doctrines, applied in new tribunals, leaving the old core nearly stationary, so that in Lord Coke's time, after four hundred years of growth, the books containing the common law might be carried in a sack. The corpus could be learned by heart, and bearing this in mind you can understand why what seems to us stupid and barbarous methods of instruction should have so long survived in England.

In Coke's time no generalization was needed or attempted. You have only to read a few pages of Coke on Littleton to observe Coke's neglect of, and contempt for, anything approaching scientific methods, and in London this neglect and contempt continued for generations. The universities never taught the common law as they did the civil law; even in the last century students learned rhymes to help them to retain the cases in Coke's Reports, and, as the only path to knowledge, either underwent the drudgery of copying papers in an attorney's office or read with a special pleader. Lord Campbell, who entered Lincoln's Inn in 1800, thus described the atmosphere

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then prevailing: 'The writ of Latitat was still as much venerated as the writ of Habeas Corpus, and all the arbitrary and fantastic rules respecting declarations, pleas, replications, rejoinders, surrejoinders, rebutters and surrebutters, which had arisen from accident or had been devised to multiply fees, or had been properly framed for a very different state of society, were still considered to be the result of unerring wisdom, and eternally essential to the administration of justice. Antiquity was constantly vouched as an unanswerable defence for doctrines and procedure which our ancestors, could they have been summoned from their graves, would have condemned or ridiculed.'

Such conditions were very obviously an effect of expansion at the points of least resistance or of highest pressure. Vested interests victimized longest those who were weakest. The vigorous commercial class pretty promptly brought the King's Bench to terms, but the wards of chancery were almost helpless, and accordingly in chancery, under Lord Eldon, the worst abuses prevailed. The fusion of law and equity procedure came very late; that of the divers parts of the criminal law early, through the abolition of the Star Chamber.

In the seventeenth century, after the old nobility had been crushed, Parliament, under the control of the City of London, abolished the Star Chamber, and

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the Court of King's Bench acquired so much of the jurisdiction the Star Chamber had exercised, as suited those who remodelled the law. It assumed only a part, for it needs no argument to demonstrate that the less the possible resistance to the central authority, the milder the criminal process can afford to be.

The same class of business men, led by the merchants of London, who in the seventeenth century amalgamated the Star Chamber and the King's Bench, in the eighteenth amalgamated the law merchant with the common law. And I beg you to remark that with this first great expansion of the corpus juris came the first effort at intelligent generalization.

On November 8, 1756, Lord Mansfield became Chief Justice of England, and about ten years later his friend William Blackstone published his Commentaries, the first volume appearing in 1765. Had Mansfield triumphed completely, he would have partially fused law and equity, but in attacking equity he lacked support. The fees at stake were enormous, and the suitors often feeble. In England law and equity remained so sharply separated that I can well remember as a boy how scandalous it was thought for Lord Campbell when Chief Justice to accept the Chancellorship, since he knew only law. An American can hardly conceive of a Chief Justice of the

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United States who would be incompetent in equity. In America lawyers have always been expected to cover the whole field, and accordingly in America we have made persistent efforts to reach some intelligent system of generalization and instruction, and thus arose the Law School.

The problem presented to instructors in Law Schools was how to deal with this old question of the universal, which had so enormously expanded. The 'perfection of reason' could no longer be grasped in details. No one could remember the decided cases. A choice was thus presented: men could specialize and read precedents in small sections, or they could generalize from the precedents and teach comprehensive rules. At first they tried generalization. I think I may say that Story's professorship at Harvard marks an epoch. Story's ambition was to teach the whole corpus juris, and finding no materials at hand, he wrote his famous text-books between 1830 and 1840. One difficulty he met with is that the text-book is really a digest, and its value as a digest depends on its novelty. This experiment of Story's lasted for a generation, and fell into disrepute about the time I studied law, because it was found to be defective as a legal training. Reading a text-book made the student superficial and inaccurate, beside enfeebling his power of close reasoning from premise to conclusion; a power essential for all lawyers to

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cultivate. The reaction from the text-book and the lecture led to the historical method, which is still largely employed and which you all know. The historical method is, I apprehend, an effort in substance to return to the days of Lord Coke, with the addition of an orderly arrangement; except that the universal is with us split into minute subdivisions with hardly an attempt at classification.

Now, gentlemen, I can recommend the historical method as a means of mental training, just as I can recommend the old common law pleading as mental training supposing you have time, but as a system of instruction in the modern law, I consider it insufficient, and this for two reasons. In the first place, Blackstone, if he taught the universal, at least undertook to teach the whole of it; but the historical method tends to metaphysical abstractions, relating only to a fraction of the corpus juris. It is specialization carried to an extreme. I fear that nothing can be more misleading than to read an historical series of decisions relating to corporations or carriers or contracts, for example, without a commentary on the social changes which have caused and are causing old legal notions to vary fundamentally from modern.

Secondly, I conceive that the tendency of the historical method, if used as instruction and not as training, is towards an undigested specialization; and against an unscientific specialization I protest.

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In our age we have, in instruction, too much specialization, because it is easy. On the other hand, the imperative demand of society is for generalization, as any one can see by the price the faculty commands in the market. I consider this question of the cultivation of the faculty of generalization of such importance that I must take the time to make my meaning perfectly clear.

Generalization may be defined as the arrangement of facts in orderly relation, by the rejection of the immaterial. Administration is the application of generalization to practical life for the attainment of effective operation without waste. A machine is a generalization. It is an arrangement of facts, or of objects in order, by the rejection of the immaterial. The improvement of a machine by simplification is a completer generalization by completer rejection of the immaterial. The installation of a machine for the saving of labor is administration. The uniting several machines in a factory is an improvement in administration. Thus administration is always based on generalization, and is often nothing but generalization in a practical form.

The more complex the organism, the more numerous the facts to be classified, the greater the strain upon the mind, and the more the tendency to waste. Waste may be in any form — either a waste of time, of energy, or of material. A railway is perfect in

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administration in proportion as all its rolling stock is continually in motion in paying traffic without waste of labor or material. Waste is usually the chief cause of loss, and therefore the saving of waste is, next to business judgment, the most valuable faculty in the head of a great enterprise. The perfection of the administration of the Standard Oil is the chief reason of its success. To obtain a man who can suppress waste in a great corporation ceases to be a question of money, it becomes a matter of necessity. It signifies nothing how many thousand dollars you pay an administrator who can save you millions. Speaking generally, in the United States, whatever concerns are based upon science are well administered, those based upon law are ill administered. The railway, the factory, the mine, are usually operated by means of the last scientific generalizations, put in practical use by excellent administrators. Our towns, states, and nation are ill-administered, because their organization rests upon legal conceptions a century old.

Compare for waste the municipal administration of New York with the Standard Oil.

So far does the law lag behind business that the law has become an impediment, and one of the most important functions of counsel is to devise means of conducting necessary business operations, which the law either forbids or discourages.

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We now come to the application of these principles to your case. Your object is to train yourselves in such a manner that you can understand the relations of the different parts of the law to each other and to society, for if you confine yourself to a single department, you can never rise beyond that department, and you will be paid accordingly. Furthermore you will be comparatively useless in that great function of the lawyer's life, the legislative and the executive career.

The question is, how you are to treat your minds. We must start with the axiom that the mind is a machine capable of a fixed amount of effort. You can expend your energy in turning your brain into a receptacle for facts. This is to remain passive. Or you can use it as an engine for generalization and administration, that is, an instrument for arrangement by rejecting the immaterial. This is to be active. In the latter case the problem ceases to be what you can remember and comes to be what you may reject. In early days before men learned how to write, they had to remember everything. For our purposes writing and printing may be considered as artificial memories, and now by libraries we have infinite memories, if we can use them. The task of the librarian is to give us access to this infinite memory by generalization and administration.

The law has now acquired a bulk when to re-

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member a tithe of its details is impossible. Our best hope is to imitate the example of those men who have practically to deal with great and complex affairs in daily life. The head of the Steel Trust is not expected to be a specialist in mining, in transportation, in metallurgy, in chemistry, in mechanics, in building, in buying and selling, as well as in finance. Probably you would find him highly trained in one or more departments, and so familiar with the relations which the rest bear to the whole that he can deal with all as a unit. Were he incapable of this, he would never rise beyond the department which alone he comprehended; that is to say, he would stay a specialist, with a specialist's compensation. You all, I suppose, hope to rise. Many of you will not remain in the law; you will be drawn into business and administration, as are so many lawyers; but whether you abide at the bar or turn elsewhere, your success will largely depend upon your power to discard the immaterial, and to fasten upon that sequence of facts which will solve your problems. You must be thoroughly trained in rudiments, you must know your trade, but your special object is to acquire an active mind. I look upon an undue accumulation of facts as baggage which enfeebles the intellect. The effort to retain exhausts the strength. You must have enough facts for your purpose, always the freshest, always subject to command,

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like a dictionary of dates; more than this deducts from the energy which you should apply to reducing chaos to order.

You should not, like Lord Coke, look upon the law as a confused dust heap. The law is not a series of arbitrary distinctions to be retained by memorizing. The law, if we view it right, presents a series of phenomena, evolved by the conflict of social forces; and if we would understand those phenomena, we must begin by understanding the society which caused them. To do otherwise would be to resemble a botanist who should study plants without regarding soil or climate, or a zoölogist who omitted natural selection.

Unless I profoundly err, there are, as I have endeavored to explain, no abstract legal principles, any more than there is an abstract animal apart from individual animals, or an abstract plant apart from individual plants. The law is the envelop with which any society surrounds itself for its own protection. The rules of the law are established by the self-interest of the dominant class, so far as it can impose its will upon those who are weaker. These rules form a corpus which is more or less flexible according to circumstances, and which yields more or less readily to pressure. When the society, which is the content of the envelop which we call the law, expands or contracts regularly and slowly, the envelop,

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yielding gradually, tends to conform without serious shock; conversely, when society breaks suddenly with its past because of the instantaneous injection of some new energy which disturbs the habits of life, the law may not automatically adapt itself to the change, but may be rent by what we call a political revolution.

In the nineteenth century our society broke with its past by the introduction of steam. The railroad is not a regular development of the highway and the wagon. The locomotive differs from the horse or ox, not in degree, but in kind. It is a new energy. So in the last few years with electricity. It is not a development of what went before. It is the advent of something new. But if the energy is new, there must be a new envelop for the energy, for you can no more reason from highway precedents to railway problems than you can reason from the ox to the electric battery. If you undertake to do so, it must be with reservations which presuppose your familiarity with the difference between the application of animal power and electricity.

It follows that every change in mechanical appliances which alters methods of competition, must be reflected in the law, if not avowedly, none the less effectually. Frequently the alteration of conditions is shown by lawlessness, which indicates that the old envelop is splitting; that is, that the old laws no longer avail, though they remain nominally in force. If the

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rent grows large enough, disorder turns to anarchy, which is the more dangerous the higher the social momentum; since the greater the momentum, the broader must be the chasm to be bridged.

I suppose within seventy-five years social conditions have changed more profoundly than they had done before since civilization emerged from barbarism, and, apparently, we are only at the beginning. Yet for every change in the ways of daily life which has been wrought by science, there must be a corresponding change in law — a conscious change where legislatures or courts intervene, an unconscious change where the law collapses. As I see the situation, the law is lagging dangerously.

I do not think I overstate the matter when I say that this community lives very largely in defiance or in disregard of the law. Wherever you look you mark the same phenomenon. Last spring Secretary Taft gave an address at Yale upon the failure of the criminal law, and no one has better means of judging than the Secretary of War. I have as yet met with no criminal lawyer who disputes his conclusions. You have only to read in the newspapers the accounts of lynchings, of crimes of violence, of undetected murders, of terrorism by strikers, and of those numberless criminal frauds which go unpunished for lack of law, to find abundant confirmation. The family is disintegrating. Marriage has ceased to be a

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permanent state, and has become an ephemeral contract, with no adequate provision for children. A scandalous conflict of laws results, to which we find no remedy. Another step and you come to corporations, public and private, whose regulation presents questions so complex and so vast that legislatures and courts hesitate to grapple with them. Last of all, you approach contracts, and in contract the relations of men toward one another have been so fundamentally altered that I must devote my whole second lecture to a preliminary examination of the subject, before I can enter upon the series of vast and absorbing litigations which form the substance of this course.

I have pondered long on how to make these controversies comprehensible to students without business experience, and though I may have found no royal road, I am certain I can do nothing by talking of abstractions. If the criminal law has broken down in regard to strikes, to understand why we have recourse to equity and whither we are tending, you must fathom the dangers with which the community stands face to face. A new civilization has arisen, based on scientific discoveries and undreamed of mechanical processes which, beside generating the trade union, develop the monopoly, and through the monopoly undermine all the relations between vendor and purchaser upon which our civilization rests.

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In fine, modern life is evolving conceptions not only different from, but often antagonistic to, the old; and without understanding wherein our civilization differs from the civilization of our fathers, I fear that we shall find our fathers' law a sorry guide. The struggle over railway rates and differentials, over the national control of insurance, over government by injunction, over state ownership and the interference of the State in the matter of prices, lies beyond the so-called principles of the older law, because the energy which now finds vent through the Sovereign is a different energy from that which expressed itself through the Sovereign a hundred years ago.

Whither we are drifting we know not, but this much seems to me clear. In a society moving with unprecedented rapidity unintelligent conservatism is dangerous. No explosion is more terrible than that which shatters an unyielding law. And yet our legal system is unyielding. Even now you will find learned judges resting a judgment on trans-continental competition upon precedents of the reign of Anne, and yet we can be no more certain of any scientific inference than of the postulate that analogies drawn between a past two centuries old and our age must usually be misleading. There is no ancient and abstract principle of right and wrong, which can safely be deduced as a guide to regulate the relations of railways and monopolies among our people, because railways and

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monopolies are products of forces unknown in former times. The character of competition has changed, and the law must change to meet it, or collapse.

Such is my general theory. But should I advocate teaching you the rudiments of science, you would become neither scientific men nor lawyers, and we are bound to make you lawyers. To that end I apprehend that you should have the severest mental training, to give you command both of your powers and of your instruments. Then we must seek to stimulate your minds. Our aim should be, instead of storing your minds with facts, for which you must remain passive, to rouse activity. You should practise discarding the immaterial, that you may reduce the residuum to order. In one word, you should learn to think.

As I have explained, modern life demands men who can handle masses of facts. In Lord Coke's time, from which legal traditions very largely come, there was little demand for anything of the kind, for the accumulation of facts was small. In the seventeenth century a general could see his whole army, and his combinations were correspondingly restricted. Now a general may have a line of battle of thirty miles, and give his commands by telephone or telegraph. Hence the importance of the administrative staff. In Lord Coke's age a case seldom consumed a day. Counsel usually put in their evidence in a few

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hours, and a jury found at once. Now a lawyer, in presenting an estimate of the value of water rights, for instance, or of the reasonableness of a schedule of rates, or of the worth of a franchise, may occupy weeks with his testimony, which is taken in shorthand and printed in many volumes. This testimony then must be classified, and the proposition to be proved established by the arrangement of the salient facts, in the simplest form, with all unnecessary matter eliminated.

Contrast this system with Lord Coke's. Coke collected everything in a jumble in a book which he wrote as the facts happened to fall in his mind, because he could remember but could not generalize. That is the order in which the mind always works. Facts first present themselves in confusion. Perfection in thought consists in the elimination of the immaterial. No invention ever assumed its final shape at once. Inventions are perfected by simplification, that is, by the elimination of unnecessary parts and the obtaining of directer action. So it is with the law. We tend to confuse by complexity. I propose, as an example of my theory, to present to you my conception of that very complex phenomenon, American sovereignty, which involves the idea of what we call constitutional law. I admit that I seldom read a book on constitutional law without a feeling of confusion somewhat similar to my feeling

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toward Lord Coke; and yet we must understand American sovereignty before we can comprehend the practical bearings of our greatest controversies.

I always conceive of a sovereignty in the abstract as the resultant of several conflicting forces moving in a curve. If law were the will of the strongest, it would be logical and direct. Law is not the will of the strongest, for the will of the strongest is always deflected somewhat from its proper path by resistance. Sovereignty, therefore, is a compromise, as the earth's orbit is a compromise. American sovereignty, in especial, is the resultant of a series of compromises, which began long ago and which are still going on. The lawyer's business is to measure the amount of deflection from a straight path which American sovereignty will make at any given moment.

Of course the foundations of federal jurisdiction were laid in the Revolutionary War, but effective jurisdiction only came by such a broadening of the area of civilized life in America that a centralized control over avenues of communication was evolved as a matter of necessity. When emigration crossed the Alleghany mountains, the inhabitants of the interior had to secure to themselves free access to the sea as a first condition of existence. Two roads lay open — one down the Mississippi to the Gulf, the other across the mountains to the Atlantic.

The crisis was reached during the old Confedera-

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tion. In 1784 Washington said, when advocating his canal from the Potomac to the Ohio: 'The western settlers (I speak now from my own observation) stand as it were upon a pivot. The touch of a feather would turn them any way.'[1] Washington insisted, I presume quite correctly, that, to hold the West, the East must concede unrestricted access to and from the sea across its territory. Pursuing this idea, Washington organized his canal company, and it was in the endeavor to obtain concessions for the canal from several states, that the Constitution of the United States originated.

If this be so, and, historically speaking, it certainly is so, the Constitution of the United States only marks the moment, in the process of centralization, when the members of the social organism which we know as the Union could be in some degree coerced by the unit we now call a nation.

You must perceive for yourselves that in itself the Constitution is but a morsel of paper without inherent force. What gives it its sanction is the energy behind it, which can put armies in the field and navies on the ocean. Therefore the Constitution must mean at any particular moment just what that energy is able to effect; no more and no less. Under Jefferson it could effect very little. The states defied the federal government at pleasure. Under Jackson,

[1] Writings of George Washington, Ford, x, 408.

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in Worcester *v.* Georgia, Georgia refused to obey the order of the Supreme Court, and Jackson remarked, 'John Marshall has made his decree, now let him enforce it.' Under Lincoln nearly half the Union resisted in arms, and you know the result. Evidently the Constitution did not mean to Jefferson what it means to Roosevelt; it did not mean to Taney what it meant to his successor, Chase; it did not mean yesterday what it means to-day, nor does it mean to-day what it will mean to-morrow.

Now we shall attack the intricacies of constitutional law itself. Constitutional law consists of a sequence of phenomena which have been evolved by the rise of a series of imperfect jurisdictions in a process of consolidation yet incomplete. The written Constitution is the outgrowth of the ancient trading charter which served occasionally as a basis for colonization. In 1628 Charles I granted such a charter to the Governor and Company of the Massachusetts Bay in New England. It was afterward forfeited for abuses. This trading charter was followed by a Province charter granted by William and Mary in 1691, which provided a basis for provincial administration down to the Revolution. Upon the abrogation of the royal power the citizens of the colony reincorporated themselves with a new charter, largely copied from the Province charter, naming it a con-

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stitution. The other colonies followed the same precedents, and subsequently the whole American people incorporated themselves as a nation, under the charter known as the Constitution of the United States.

A corporation being a fiction devised to enable several persons to operate as one, it follows that the artificial being can perform only those functions for which it is created. If it transcends these limits it acts beyond its power, and what it does is naught. In legal language its acts are ultra vires.

In like manner constitutional governments are, in contemplation of law, artificial bodies whose functions are limited by the written instruments which define their jurisdiction; and all constitutional governments, in the sense of governments founded on written instruments, are governments of imperfect jurisdiction. American constitutional law may therefore be defined as the determination of imperfect jurisdictions. Thus a cause arises involving questions of municipal law, but before the case can be decided the judges must determine the jurisdiction, whether state or national, which has cognizance of the cause. Afterwards the controversy may be examined on its merits.

Constitutional law, accordingly, is, strictly speaking, confined to a determination of jurisdiction. In some domains jurisdiction is partially or completely lacking, and on entering such domains the acts of

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the several states or of the United States, or of both, are void, or ultra vires.

Proceeding to eliminate the immaterial, you will perceive that the municipal law in America as elsewhere forms a complete corpus, only that it is cut transversely by constitutional lines which determine jurisdiction. Over some relations of contract, for instance, the states have jurisdiction, over other relations the United States, and certain relations exist with which neither state nor nation, in theory, can interfere.

An example or two will make this clear. It is ultra vires for a state to impair the obligation of a contract. New Hampshire undertook to alter the charter of Dartmouth College without its consent. The question at issue was whether the charter was a contract which the State could not impair, because to impair a contract would be ultra vires.

Evidently whether or not a charter is a contract belongs in law to the department of contract, and should be learned as such. That, on being held to be a contract, the impairment of Dartmouth's charter by New Hampshire gave the United States jurisdiction, is the constitutional side of the case, and should so be approached. To mingle the two phases of the controversy confuses the mind. In the Debs case it appeared that Debs] had obstructed an interstate highway, and had been enjoined to desist. Not de-

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sisting, he was imprisoned for contempt. Two questions were here presented. The first was whether the United States had absolute jurisdiction over interstate highways. That being determined in the affirmative, the injunction and the punishment for contempt followed from settled doctrines of municipal law, which had nothing to do with constitutions. The constitutional question was the jurisdiction; the injunction and imprisonment belong to equity.

The United States has jurisdiction over interstate commerce. The question presented by the controversy over the national regulation of insurance is whether insurance is commerce. That issue must be determined by an examination of the insurance business; constitutional law has nothing to do with it.

A student would naturally suppose that these questions of jurisdiction, turning as they do upon the provisions of simple instruments, might be resolved with almost the exactness of geometry. In fact they are the most uncertain, the most treacherous, and the most important issues in the law, for they are those on which hinge the greatest interests.

The ordinary corporation holds a charter which is construed by a tribunal external to itself. The nation construes its own charter, whose meaning must accordingly vary to coincide with the physical force which controls the nation, and expresses itself

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through the Sovereign. Thus the slaves, which were the property of citizens, were confiscated by proclamation as an effect of victory in war. In like manner any other property might be confiscated by an equivalent expression of force.

There is nothing in the nature of things to prevent a construction of the Constitution which would create an empire in the United States, should energy ultimately take such a direction. Whether it will or not must depend upon a conflict of forces now immeasurable. An absolute empire would be a perfect jurisdiction. I wish to dwell upon this aspect of constitutional law, because you, as lawyers, have nothing to do with preconceived ideas. Your function is confined to caring for the interests of your clients. The moralist and the citizen have political opinions, but to the lawyer republic and empire are the same. The lawyer has only to measure the social forces with which he has to cope, and the more unerring his judgment, the higher will he rise.

You may possibly think that to engage in such studies is premature, and that twenty years hence will be time enough to enter upon this the most difficult of the lawyer's tasks; but I incline to think the time will not be wasted which you devote to the modern law. From the very outset your clients will measure you very largely by your adroitness in guiding them towards their object, which is perhaps for-

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bidden though necessary, without exposing them to loss or danger.

Nor is this all. Having reached the conclusion that the steady acceleration of the social movement since the settlement of the continent resulted in the establishment of the Constitution of the United States nearly a century and a quarter ago, and that since the adoption of the Constitution the operation of the same force has continually changed the meaning of that instrument, and for all that we can tell may make it signify in the future something which would surprise us now, we may well pause for a moment to observe how this same acceleration is affecting every detail of daily life, the litigation which arises in the police court as well as that in the tribunals of last resort.

In my next lecture I shall take up this acceleration in its bearing upon contracts; to-day I confine myself more or less exclusively to public or quasi-public law. I will close by adverting to the effect upon municipalities of modern scientific innovations.

You know that Massachusetts is formed of townships which, in theory at least, are petty republics, exercising various rights of sovereignty; among others they build roads and maintain police. The highway is to the social organism what the artery is to the body, and faulty arteries are dangerous in propor-

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tion to the volume and the rapidity of the circulation. But because of local self-government the highways of the Commonwealth are built in sections without common engineering design or unity of structural method, and are guarded by local police notoriously inefficient to enforce even elementary highway regulations.

This system was adapted to the society which evolved it. When population was scanty, animal power alone was used upon the roads, and traffic was light. Recently we have given over the highways to electric railways, and have opened them to automobiles. Rightly or wrongly, many complain that the railways obtain the use of the highways without paying due compensation, and they are certainly subject to no effective police control. Perhaps you may have already discovered that it is not easy to resist their schemes. But the electric railway is the least part of the difficulty to be solved. The roads as they are now built, or as they are likely to be built under local self-government, are unfit to carry engines of great weight, running at very high speeds. To make automobile traffic reasonably safe, roads must be scientifically built and adequately policed, somewhat as are our park roads. Everybody knows that the local police is as worthless for modern highway purposes as local engineering. A scientifically built and administered system of highways appears to be

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one of the necessities of the future, yet such a system must be a work of a centralized administration. You have before your eyes the embryo of such a system in the Metropolitan District, where water, drainage, parks, and to some extent roads and police, are centralized. The inference to be drawn from these facts is that the process of consolidation which is now advancing with increasing rapidity with each advance in science which accelerates movement, is entering upon the stage when serious social changes must ensue. Apparently the local self-government of the past must yield to modern methods of administration, or else, when the new society has burst its old envelop, disorder will ensue. But anarchy is the one eventuality which lawyers must always refuse to contemplate. If my reasoning is sound, a heavy responsibility will rest upon you of the rising generation, for should the movement of the future at all approximate in progressive acceleration the movement of the past, something akin to a new corpus juris must be developed within the next fifty years. If the energy of the present differs from the energy of the past, not in degree but in kind, so must the civilization of the future, the effect of that energy, differ in kind from the civilization which is now moribund. Also this new birth must be swathed in a new envelop of law.

Such being my belief, I would urge young men

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who study the law to examine tradition with an open mind and to weigh the facts for themselves. You cannot begin too soon; for to be successful yourselves and useful to your country, you must not only understand the precedents in the books which represent conservatism, but you must comprehend those new forces which are making trusts, which are building up trade-unions, which are consolidating our municipalities, and which are lending intensity to the growing energy of the Federal Jurisdiction.

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LECTURE II

LAW UNDER INEQUALITY: MONOPOLY

IN my first lecture I tried to explain my theory of law as a science. Law is not the command of a sovereign, assuming the Sovereign to be a power apart from the subject community. Law is a resultant of social forces, and the Sovereign is the vent through which this resultant expresses itself.

Various forces being always in conflict, they become fused in the effort to obtain expression, and this fusion creates a corpus juris, the corpus inclining in the direction of the predominant force in the precise degree in which it predominates. An example of extreme inclination is the law which once prevailed in various states of the Union in regard to master and slave.

The Sovereign being only a vent or mouthpiece, the form the mouthpiece takes, or the name given it, is immaterial. Whether the social resultant expresses itself through a prophet like Moses, or an emperor like Cæsar, or a military oligarchy like the twelfth century barons of England, or a moneyed oligarchy like the modern British Parliament, the result is the same. The dominant class, whether it be

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priests or usurers or soldiers or bankers, will shape the law to favor themselves, and that code will most nearly approach the ideal of justice of each particular age which favors most perfectly the dominant class. An absolute dominion such as the power of the conqueror or the slaveholder is not infrequently attributed to a divine dispensation.[1] It follows that the law is an example of Darwin's generalization of natural selection. Those fittest to survive in each particular environment prosper, those unfit suffer in proportion to their unfitness, and nowhere is the working of this process more evident than in the development of our civilization, which, in its passage from the middle ages, elaborated conceptions of contract as its basis, and which now, under new forms of competition, is discarding them.

I suppose a contract may be considered as a voluntary agreement to do or not to do some specific thing. If an agreement be made between two persons, one of whom has no choice but to accept the terms offered, the party constrained is under duress, and, whatever his act may be called, it is not a contract.

American civilization is based upon the theory of freedom of contract, and freedom of contract is an

[1] See the opinion of Taney C. J. in Dred Scott *v.* Sandford, 19 How. 399, where this notion is implied if not expressly stated.

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effect of unrestrained economic competition, a social condition which favors men of a certain type. All social conditions however have their limits, and whenever any class reaches an undue development, its very preponderance induces an unstable equilibrium by encouraging over-competition among its members. When the moment of over-competition is reached, a period of transition begins. I am inclined to believe that the United States is now entering upon such a period. If I am right, this movement of transition may carry you very far before you leave the bar; but to make my statement intelligible to you, I fear I cannot escape repeating some part of what I have already said.

If we take a simple and martial community, like the tenth century Norse, we find that the people settled their differences by battle. Even a suit for breach of promise of marriage was decided by a duel between the man, who fought sunk to his middle in the earth in a barrel, and the woman armed with a stone. In that age a great champion speculated as boldly on his prowess as a modern man of business does upon his astuteness. A gigantic Scotchman named Liot the Pale travelled through Norway, and by single combat grew rapidly rich until he met the warrior Egill Scallagrimson, who fought with him for an heiress, and overcoming him 'vindicated all his goods to himself according to

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law.' This, of course, was irregular fighting, but in England, with William the Conqueror, came in trial by combat, which was a form of legal procedure as well regulated as trial by jury, the difference being that trial by duel was devised to favor physical strength, skill, and courage, while trial by jury is designed to neutralize them. Domesday Book shows that after the Conquest pleas of land were tried by battle or ordeal, but according to the Leges Henrici Primi there could be no combat in civil cases where the value in dispute did not reach ten shillings.[1]

Under such institutions, while the economic man was unduly depressed, the soldier was unduly stimulated, with the effect that a ruinous competition set in among the members of the aristocracy, which made them very soon adopt methods which displaced the social equilibrium. Soldiers found that to make head against their adversaries they needed money, and to raise money Henry I sold to the citizens of London an exemption from combat; 'et nullus eorum faciat bellum.' With that charter a new era dawned, because the necessities of the men of the military type caused a deflection in the law favorable to others.

In the twelfth century the unarmed man lived at the mercy of the armed man, but the armed man himself could thrive only if he could compete with all comers. The King, as the chief among the barons,

[1] Trial by Combat, Neilson, New York, 1891.

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had to maintain a superior force, and to this end to hire mercenaries. To hire mercenaries he needed a revenue, and a revenue could be raised from those with money alone. The King's problem therefore was to obtain the most money possible. An alternative presented itself. He could protect the producer or he could rob him. Robbery offered immediate profit, but it exhausted the supply of capital. Those who plundered were lost when confronted with those who protected. Stephen could not hold the sea against Henry Plantagenet, because Stephen could raise no money, and when Henry had landed in England he brought Stephen forthwith to submission.

Henry II based his whole great career upon the encouragement of the economic man, and I need hardly tell you that Glanvill belonged to Henry's reign, and the introduction of the jury, and the chartering of the larger towns.

But as soon as one noble began to sell charters, all had to sell them, down to the smallest lord of a manor who could grant a village market. In no other way could an aristocrat maintain his position.

Thus the inhabitants of Leicester in the reign of Henry I are said to have bargained with the Earl of Leicester to get rid of the combat. They promised to pay the Earl 3*d.* annually for every house with a gable on the high street, in consideration of being permitted to erect their own court. Even if the tale be a

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fable, it illustrates equally well the need the Earl felt for money — a need arising from the competition of his like.

With Henry II began, as I said in my last lecture, the industrial and commercial expansion of the twelfth and thirteenth centuries, and it is not surprising that this expansion should have been vigorous. The field for industry and commerce lay unoccupied, and the moment a moneyed class could fortify itself behind stone walls, it held the soldiers at a disadvantage. You have only now to reflect upon the situation of society under Henry II to see unroll before you the whole development of the law, moving as automatically as the rise and fall of a tide. Glanvill has described with enthusiasm the substitution of the jury for the duel, but Glanvill's emotion sprang from the great fortune he made by the new methods, and the revenue he obtained for his master. The better the inhabitants of the towns were protected, the richer they grew, and the larger the ferm which they could be made to pay. It was this town ferm which Glanvill and all mediæval statesmen and jurists loved.

If you will look at Madox, you will find a bulky volume given up to a consideration of the 'firma burgi.' This 'firma burgi' was the tax which the citizens paid for their privileges; a tax usually farmed out to certain responsible burghers, who raised the assessment as they could from their fellow townsmen.

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The case of Dunwich, given by Madox, is an example.[1] Under Richard I, Dunwich bargained to get rid of the sheriff and to pay the King their ferm 'per manum suam.' In the sixth year of the reign two burgesses, Hubert de Tortuse and Reginald son of Robert, contracted for a ferm of £120 and a mark, and twenty-four thousand herrings. Soon after the town obtained a charter and a grant of a merchants' guild.

The case of Dunwich is worth considering because it explains the mediæval situation. Dunwich contracted with the King to be freed from the exactions of the sheriff, to be empowered to hold its own courts for the administration of the law merchant, including the law touching negotiable paper which began to come in about the opening of the thirteenth century,[2] of course also to be freed from trial by combat, and lastly to have its guild merchant. This guild merchant was a very complex and important affair.

In return Dunwich paid liberally, and doubtless could well afford to do so. Probably the '£120 and a mark' mentioned by Madox, meant one hundred and twenty pounds and eight ounces troy of silver. If this be so, and allowing silver to have had then only tenfold the purchasing power which it had in 1870 when silver stood at the old parity with gold, the ferm of Dunwich represented about $16,500 of

[1] Firma Burgi, Madox, 232.

[2] Le Commerce de Marseille au moyen âge, Blancard, i. pp. 3, 5, 37, 299, 303, 304, 319, 326, 329, 330, 397, 407.

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our money, not counting the herrings. Nor was this all. Beside the regular ferm the town was liable to occasional exactions. Frequently these were heavy. Richard's ransom of 150,000 marks of silver, equivalent, at nine dollars to the mark of eight ounces, to something over $13,500,000 to-day, fell in this very year of 1194. This large sum had to be met by the kingdom, and probably most of it eventually came from the municipalities whose citizens were assessed one quarter of their goods. In fine, the bargain between the moneyed class and the Crown amounted to an arrangement by which the business community met the charge for the police which the King used to control the feudal aristocracy.

Gross has thus stated the case in 'The Gild Merchant': 'The king tallaged his boroughs whenever he pleased. "Our goods and chattels" said a jury of the townsmen of Hereford, "are to be taken and taxed at his pleasure, saving unto ourselves a competent quantity for our sustension and the tuition of our city."'[1]

Beside the royal taxation the mediæval borough had to meet other heavy outlays. The burden of defence was excessive, the walls were prodigiously costly and had to be guarded night and day; but even the expense of defence was probably less than the drain of the religious establishment. Not to speak of

[1] The Gild Merchant, 57.

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the convents and the impositions of the Papacy, the towns competed with each other in regard to the magnificence of their churches and the splendor of their ceremonies. Indeed municipal extravagance toward the end of the thirteenth century culminated in general insolvency in France, and a more or less complete repudiation of debt.

Although individuals might at the outset become responsible for such liabilities, they could not continuously sustain the load. To maintain the common credit some permanent organization was necessary, and accordingly the wealthy citizens organized a syndicate for financing the borough. This syndicate they called the Gilda Mercatoria, or Guild Merchant. The members were not necessarily inhabitants, nor did they avowedly constitute the municipal government, although they must always have substantially directed municipal affairs. The Merchants' Guild undertook to make good municipal dues by a voluntary contribution among guild members, known as 'scot and lot.' In return the Crown with the assent of the borough granted the guild the privilege of regulating trade, and of fixing prices, within the limits of the municipality.

Probably at Dunwich in 1194 every man engaged in trade, and some who were not, entered the guild. Beside these were such strangers as thought it worth while to become subject to scot and lot in consider-

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ation of being relieved from the trade restrictions imposed by the guild on outsiders. In Glanvill's time England was full of such petty provincial markets, and it was in these markets alone that business could be done. In them only could money be borrowed or manufactures or luxuries bought, and within their walls the guildsmen enjoyed a safe monopoly, for no one who lived in open country could compete with them because of violence.

When Henry II came to the throne the common law offered no remedy for breach of simple contract, and he who would enforce the penalty of a bond had to do so by duel. Within the chartered towns the burghers could peacefully sue one another, it is true, but no aristocrat would pass the walls who feared process. At home the soldier could prove his case by arms. There could be no credit under such conditions, and accordingly transactions between the castle and the city were usually limited to sales for cash, to barter, or to loans on pledges of portable property, such as jewels or relics. This answered for the eleventh century, but with the crusades and the opening of the Eastern trade, the necessities of the aristocracy became acute.

No baron could enjoy social prestige, not to say his freedom, without ready money. One of the grievances of Magna Charta was the arrest and spoliation by John of those who had not power to

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resist. But most nobles could obtain cash to any amount only by pledging their land, and trial by combat was incompatible with a marketable pledge of real estate. Hence the advent of an age of extravagance and consequently an age of complex financial transactions introduced what we should call an age of legal reform.

Two great innovations came in with Glanvill, who was appointed Chief Justiciary in 1180, and who died before Acre in 1190. The first was the Grand Assise, which Glanvill thus described: 'The Grand Assise is a certain royal benefit bestowed upon the people, and emanating from the clemency of the prince, with the advice of his nobles. So effectually does this proceeding preserve the lives and civil condition of men, that every one may now possess his right in safety, at the same time that he avoids the doubtful event of the Duel.'[1]

By the Grand Assise the tenant in the writ of right, which brought in issue the title to land, might decline the combat, and elect to abide by the verdict of a jury of twelve knights to be returned according to a fixed procedure by the sheriff. These knights did not hear evidence, but were supposed to decide the cause by personal knowledge of the facts. They were, in fact, witnesses.

The Grand Assise sensibly improved the mortgage

[1] Glanville, Beames ed., Chap. VII.

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as a security. Suppose one of Glanvill's contemporaries wished to go upon a crusade, as most of them including Glanvill himself did, he would need a supply of bullion. Glanvill, when he accompanied Richard to Palestine, is said to have contributed five thousand pounds of silver, or even more. In 1202 the French nobles at Venice had to send their jewels and plate to the Ducal Palace to pay for their transportation, and when they had stripped themselves of everything but their arms, they remained 34,000 marks in debt. The crusader then would certainly need cash according to his rank, and his only resource would be to borrow on his land. In the twelfth century the conveyance of land was made by actual livery of seisin, except possibly to Jews, and this livery could be witnessed by as many knights as the creditor might think expedient.

On his return from the Holy Land the crusader was generally bankrupt. Under the common law he could have proved his right to the land he had pledged by duel, or if he had died abroad his heir might have done the same. Under the Assise, if he tried to regain possession, the tenant could waive the combat and resort to his witnesses. By these, were the sheriff tolerably fair, he might hope to prove his case.

It sometimes happened, however, that the defaulting mortgagee did not dally at all, but simply disseised the tenant by force.

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The position was then reversed, and the creditor became the demandant in the writ of right. By common law or even by the Grand Assise the debtor who had thus become the tenant would have been able to elect the duel, but in Glanvill's time the creditor was here also protected by the writ of novel disseisin. A recent disseisin was one committed since the last circuit, and a plaintiff who sued out this writ and gave security to prosecute his action was reinstated forthwith in his land. If he recovered final judgment before the jury whom the sheriff summoned, he was entitled not only to his land but to damages, this being, as Blackstone observed, 'the only case in which damages were recoverable in any possessory action at the common law.'

In practice the improvement in process hardly corresponded with the advance in theory, for relief lay pretty much in the discretion of the sheriff and the debtor was apt to be a man of rank and one of his friends. Palgrave has explained the suitor's difficulties.[1] Though the sheriff was in duty bound to summon a jury who knew the circumstances and could testify to the truth no one could force him to do so. But unless he summoned men who could swear to the facts, there could be no verdict 'quia patria nihil scire poterit de facto nisi per presumptionem et per auditum,' and then the litigants were

[1] The Original Authority of the King's Council, 55.

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remitted to the combat. Or the sheriff might go even further and summon an unfriendly jury, since he had a discretion; 'This discretionary power of naming the jury, became a fertile source of corruption and of suspicion. . . . And the means which the organization of the Township and Hundred juries afforded, of wreaking private malice and spite, under colour of the law, were but too readily abused.'

Finally the sheriff sometimes was powerless. A good example is recorded in the case of the Abbot of Eynesham *v.* Harecourt. Here the Abbot as late as 1503, in the reign of Henry VII, complained to the Star Chamber that his great neighbor, 'Sir Robert Harecourt, having robbed him, and tried to burn his convent, and attacked and wounded his servants, likewise overawed the officers of justice when he sought relief; 'also the said sir Robert at euery sessions and assise wolnot suffre the kynges lawes peasable with justice to be execute and especiall when any nisi prius shuld pass by twen partie and partie yf the jury be not retourned after his mynde with his riotous adherents he stoppith them with thretenyng and other meanes that the true proces of the lawes may not passe but after his wilfull and vnlawefull pleasurs.'[1] And a little reading in the early records of the Chancery will show what violence prevailed

[1] Select Cases in the Star Chamber, Selden Society, 150.

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in England even in tranquil portions of the middle ages.[1]

At the end of the twelfth century in England, aside from the clergy, who, for our purposes, may be disregarded, energy expressed itself through three well-known vents — the Crown, the feudal aristocracy, and the moneyed class inhabiting the walled towns. It was the age of Cœur de Lion and Glanvill, men who knew how to fight as well as how to reform the law. The king was the most redoubtable soldier of the martial class, no more. He had to maintain himself with his hands, and he relied for his superiority over rivals mainly upon an ampler revenue which enabled him to pay more mercenaries. This revenue he drew, in large part, from sales to guildsmen of privileges and of justice.

For some centuries the country gentry practically controlled the administration of the common law, since the sheriffs came from among them, and, through the sheriffs, the juries. Singly the barons might be no match for the Crown, but, in the litigations of daily life, they could usually prevail against the King in his own provincial courts. At London, on the contrary, the King could try causes himself without a jury, and, as long as the cities would support him, he could

[1] See Straunge *v.* Kenaston, Select Cases in the Star Chamber, Selden Society, xc and 274, which shows the paralysis of justice on the Welsh border as late as 1508.

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enforce his process against all opposition, even if he had to remove a sheriff and send an officer of his own into the county, as Richard did after the outbreak at York. Thus, by the end of the reign of Henry II, the guildsmen held the balance of power between the aristocracy and the Crown, as was proved by the helplessness of John at Runnymede after the defection of London. The effect of this rise in energy of a recently despised class is manifested in the extension of the summary process of the prerogative courts, exercised chiefly for their benefit and for the benefit of the Jews.

After Glanvill's reforms nothing would induce the aristocracy to make further concessions, and as no royal edict could have the force of law without the assent of the grand council of the clergy, nobles, and gentry, no further coercion could lawfully be applied to the debtor. As borrowing, however, went on, it became very profitable to the Crown to speculate in doubtful bonds held by usurers, and to collect the penalties by summary process utterly abhorrent to the common law. First Richard, and then John, resorted to pretty sharp methods to squeeze debtors, and made much money thereby. Richard, after the slaughter of the Jews at York, collected for himself every debt of which he could find a trace.

John made the error of not confining his attacks to a single class, but of harassing the merchants as

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well as the gentry. He even arbitrarily undertook to raise the town ferms. Hence the revolt of London which led to the promulgation of Magna Charta, for Magna Charta was only a treaty made between the allied barons and cities on the one side, and the Crown on the other. The allies divided the spoil. The gentry inserted the famous clause: 'Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur aut aliquo modo destruatur nec super eum ibimus nec super eum mittemus nisi per legale judicium parium suorum vel per legem terre. Nulli vendimus, nulli negabimus, aut differimus rectum vel justitiam.'

That is to say, paraphrasing the barbarous Latin, the barons stipulated that the King should neither arrest, disseise, imprison, nor outlaw them, except by process of the common law, and that he should promise never again to collect debts against them, owing to Jews or others, on speculation, or by any of the methods enumerated. To secure the adhesion of the cities to this program the nobles conceded to the merchants that they should have a guaranty against raising their ferms, and that they should travel where they pleased about their business without being subject to extortion at the ports and elsewhere. On this basis of mutual advantage London received the insurgents, John's supporters thereupon saw the hopelessness of resistance and deserted him,

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and the charter was sealed at Runnymede on June 15, 1215.

As usual with written instruments, Magna Charta was eventually interpreted to mean what it suited the convenience of those who construed it that it should mean, and before long the gentry discovered that it afforded them small protection against processes unknown to the common law. The social conditions of the thirteenth century forced the aristocracy to borrow. Those who lent them on the security of their land knew that to recover on their bonds something more was needed than the right to appeal to the oaths of the knights of the vicinage, and therefore creditors took care to charge enough interest to allow of their offering half the face value of the obligation to the King for the help of his Council.

The Royal Council could, of course, 'seize, imprison, or outlaw' any ordinary noble without risk, so long as the King kept London in good humor; and this he was the more likely to do if he collected the debts of its citizens, no matter by what process, Magna Charta and the common law to the contrary notwithstanding.

Convinced, by their failure in securing relief by Magna Charta, of the futility of royal promises made under duress, the aristocracy abandoned appeals to force, and tried to save themselves from ruin by limiting their power to mortgage. In 1285, just two

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generations after Magna Charta, Parliament passed the Statute De donis conditionalibus, making entails inalienable. Before this statute a man who held to himself and the heirs of his body, held a conditional fee simple, and might cut off his heir. After the statute such a man became a tenant for life, unable to encumber the remainder.

But whatever the aristocracy did, borrowing still necessarily went on, and one chief effect of the Statute De donis was to make the jurisdiction of the Council more necessary than ever, for if the creditor in a bond could under no circumstances seize a debtor's land and bar the heir, it became the more essential for him to be able to seize the debtor's body. Therefore, to use the words of Palgrave, 'no man who could approach the Council, would content himself with the common law,'[1] and it was doubtless the determination to make the jurisdiction of the Council more effective which brought the writ of præmunire into vogue. The writ of præmunire preceded and resembled the writ of subpœna, and commanded the defendant to appear under a penalty at Westminster, to answer to the Council. It must also have followed pretty quickly after the Statute De donis for that passed in 1285, and the Statute of Præmunire itself in 1353, when the writ was already well established and old. However this may have

[1] Original Authority of the King's Council, 32.

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been, it is certain that the Council continued uninterruptedly, after 1215 as before, to imprison and outlaw in an arbitrary manner, if arbitrariness consisted in defiance of Magna Charta and common law.

There were always many who vehemently suspected that persons near the throne bought up Jewish bonds and vexed embarrassed gentlemen with fines, imprisonment, and outlawry until they were forced into ruin to meet usurious contracts condemned by the Church. So provoked, it was natural that the landed gentry, who controlled the House of Commons, should have protested incessantly, from the passage of the Statute De donis in 1285 to the decision of Taltarum's Case in 1472, against practices which were plainly forbidden by the most solemn written covenants. Palgrave has related the history, and he has shown that the struggle only ceased under Edward IV, when the feudal nobility was tottering to its fall.

So long as the aristocracy could maintain the Statute De donis which protected their family entails, some of the old vitality lingered, but the irresistible pressure for money caused by the reprisals of the War of the Roses forced the gentry in 1472 to submit to the collusive decision in Taltarum's Case, by which through the common recovery the tenant for life barred the heir. Then, as it were in a moment, the society of the middle ages perished.

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The baronage and the guilds collapsed together. Taltarum's Case preceded by but ten years the death agony of the reign of Richard III, and on August 22, 1485, Henry Tudor fought the battle of Bosworth. After the victory Henry and his son crushed the last spark of life out of that portion of feudal society whose strength lay in arms.

Henry VII used the Star Chamber to confiscate the fortunes of those families in whose fortified houses he saw a threat of resistance, and Henry VIII finished his father's work by the proscriptions which followed the Pilgrimage of Grace in 1536. Thus a complete revolution in society and in law was accomplished by the operation of two causes: the advance in taxable wealth, and the discoveries of science. By the invention of gunpowder a weapon was placed in the hands of him who could afford to use it, which was irresistible as against an enemy less well provided. But a train of artillery could not be maintained by any one without the power of general taxation. Therefore the Sovereign, representing the collective wealth of the nation, became absolute. Had the art of war remained stationary after the reign of Stephen, little could have been done toward perfecting legal process, for each enforcement of a subpœna against a baron would have entailed a siege. More powerful military engines came in with the crusades, and especially after Richard's expedition

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to Palestine in 1190, war assumed a new aspect. Fortifications fit to resist the improved projectiles became extremely costly, and the effect was manifested at once in the distress of the lesser nobility. John's so-called outrages against common right, which were condemned at Runnymede, would have been impossible a century before, for under Stephen any strong tower could only be taken by famine or surprise. Still later, in the year 1500 no man in the kingdom could hope to cope, even temporarily, with the artillery which Henry VII could bring into the field, were he disposed to organize an attack. Accordingly Henry VII showed slight respect for the common law or for common justice. The towns were with him. Parliament passed acts constantly against maintaining armed retainers, so jealous were the rising class of the shadow of resistance, and Hume has thus related how Henry used the power so acquired:

The Earl of Oxford, Henry's favorite general, entertained him splendidly at Heningham, and at the King's departure 'ordered all his retainers, with their liveries and badges, to be drawn up in two lines, that their appearance might be the more gallant and splendid.' The Earl's vanity cost him dear.

'"My lord," said the King, "I have heard much of your hospitality; but the truth far exceeds the report. These handsome gentlemen and yeomen, whom I see on both sides of me, are, no doubt, your

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menial servants." The Earl smiled, and confessed that his fortune was too narrow for such magnificence. "They are most of them," subjoined he, "my retainers, who are come to do me service at this time; when they know I am honored with your majesty's presence." The King started a little, and said, "By my faith, my lord, I thank you for your good cheer, but I must not allow my laws to be broken in my sight. My attorney must speak with you." Oxford is said to have paid no less than fifteen thousand marks, as a composition for his offence.'

Though meaning to compliment the King, Oxford doubtless committed a technical crime, but no jury, much less his peers, would have convicted him. Henry extorted a ruinous fine from Oxford through fear of the Star Chamber, which used a procedure unknown to the common law. It is true that after centuries of struggle the disputed jurisdiction of the Star Chamber had been legalized by statute, but the very passage of 3 Henry VII, c. 1, which conferred this criminal jurisdiction demonstrated the fall of the old aristocracy and the preponderance of a new force which deflected the law from its old path.

Blackstone has thus described the process: 'When the Statute 3 Hen. VII, c. 1, had extended the jurisdiction of the Court of Star Chamber, the members of which were the sole judges of the law, the fact, and the penalty; and when the Statute of 11 Hen.

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VII, c. 3, had permitted informations to be brought by any informer upon any penal statute, not extending to life or member, at the assises or before the justices of the peace, who were to hear and determine the same according to their own discretion; then it was, that the legal and orderly jurisdiction of the Court of the King's Bench fell into disuse and oblivion, and Empson and Dudley (the wicked instruments of King Henry VII) by hunting out obsolete penalties, and this tyrannical mode of prosecution, with other oppressive devises, continually harassed the subject and shamefully enriched the crown.'[1]

Blackstone points out truly enough the oppression suffered by one portion of the community; but on the other hand the Star Chamber was the instrument through which order, in the modern acceptation of the word, was established, and unrestrained economic competition made possible. Accordingly the moneyed classes never swerved in their loyalty to the Tudors, and saved Henry VIII at the crisis of his destiny. In 1536, on the suppression of the convents, the leaders of the Pilgrimage of Grace announced their intention of making a pilgrimage to London to have the 'vile blood put from' the Privy Council, 'and noble blood set up again,' and also to redress the wrongs of the Church. The 'vile blood' in the Council was Thomas Cromwell, then minister,

[1] Comm. IV, 310.

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a commercial adventurer, especially hated by the old aristocracy.

Henry's policy, as interpreted by Cromwell, was one of extermination. Lord Darcy may be taken as an example. In 1536 Lord Darcy was the foremost representative of the feudal nobility surviving in England. He had all his life been a soldier, and he had enjoyed the highest dignities of the State. At the outbreak of the rebellion he commanded at Pontefract, which was untenable. He surrendered, was afterward pardoned, enticed to London, thrown into the Tower, and beheaded. While awaiting execution he was visited by Cromwell, whom Darcy thus addressed:

'Cromwell, it is thou that art the very original and chief causer of all this rebellion and mischief, and art likewise causer of the apprehension of us that be noble men and dost daily earnestly travail to bring us to our end and to strike off our heads, and I trust that or thou die, though thou wouldst procure all the noblemen's heads within the realm to be stricken off, yet shall there one head remain that shall strike off thy head.'[1]

So perished the old feudal aristocracy at the hands of the guilds, and of the guilds' representative, the

[1] State Papers, edited by Messrs. Brewer and Gairdner, xii. pt. 1, No. 976.

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Crown. That the guilds themselves also should thereafter perish was inevitable, for the aristocracy and the guilds formed complemental parts of a single social system and were interdependent. The guilds lived upon certain trade monopolies, and these monopolies in turn were only made possible by the existence of a predatory class living in the country, whose depredations made the conduct of business in any open town impossible.

As I have stated, the merchants' guild originally was a syndicate of capitalists who, in consideration of guaranteeing the town's ferm, received a grant of a trade monopoly. In London, where accumulations were greatest and most taxable property could be found, it is doubtful if a merchants' guild was organized. If it were, it soon split into trade guilds. Nevertheless many of the more important provincial cities obtained their guild merchant during the twelfth century, among them Winchester, Nottingham, Durham, York, Carlisle, Chester, Bristol, and Lincoln, while some, equally important, like Norwich and Exeter, whose franchises were modelled upon London, appear to have had none.

In any case, as industry specialized and capital accumulated, the original syndicate divided by trades, and as it divided, the municipal administration passed altogether into the hands of a mayor and council, while trade regulation fell to the guilds. The capital-

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ists, therefore, retained the power of arbitrary taxation with no corresponding responsibility. Popular resistance followed.

The reign of Edward III was a period of rapid expansion, and each guild claimed and enforced the right of excluding strangers, who competed with them, from the markets of their town. Thus they could fix what prices they pleased for their goods. Soon men came to hate this monopoly, and early in the reign, in 1335, the first hostile statute which I have discovered was passed. The preamble set forth that the exclusion of foreign merchants from the boroughs caused the whole people of England to pay too dear for what they bought, wherefore it was enacted that foreign merchants might freely sell their goods in any chartered town, any custom or charters to the contrary notwithstanding.

Thenceforward the regulation of prices occupied more and more attention, until, just a century later, in 1437, in the reign of Henry VI, Parliament, after complaining that the guilds, by color of rule and governance and grants in their charters, for their own profit and to the common damage of the people, make for themselves many unreasonable ordinances, ordained that such ordinances should be approved by justices of the peace under pain of fine and forfeiture.

Finally, in 1504, a radical statute was passed, which

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lodged a complete control in the government, 'as well in pricis of weyres as other things.' By it the guilds were prohibited from making any ordinances or even acting on those in force, without the approval of the Chancellor, Treasurer of England, or Chief Justices of either Bench, or three of them, or before both the Justices of Assise in their circuit, in the county in which such ordinances were made, under a penalty of no less than £40.

Before going further, I must define the nature of a grant of a monopoly. When the law confers upon any man or class of men an exclusive privilege to fix a price upon some object which is a matter of necessity or even of desire to others, it concedes a sovereign power to the vendor, and subjects the purchaser to a servitude. Fixing prices is an ordinary method of raising revenue, and monopolies in tobacco, spirits, explosives, and the like are used generally as a form of taxation. When such a privilege is enjoyed through operation of law by a private person or corporation, that person or corporation participates in the prerogatives of sovereignty; and those who deal with him or it do not contract, since they are subject to more or less complete duress. A man who may not sell his labor, but must work at the will of another, is a slave. A man who may not grind his own corn, but must have it ground at a

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certain mill at a fixed price, is a serf. A man who must pay toll for the use of the highway over which he must pass, is under a servitude. Therefore, in the fourteenth century, all England was under a completer servitude to the guilds than were usually the villeins to the landlords, and the acts of Parliament indicate a long struggle for equality before the law, which terminated only with the destruction of the guilds themselves.

In the words of the Act of 9 Edward III, c. 1, the guilds made the 'king, the prelates, earles, barons, nobles, and the people of this realm' pay 'more dear' than they otherwise would for the things they purchased. Therefore the servile or purchasing class insisted, as a matter of self-preservation, upon establishing some tribunal which might set a limit upon the power of the privileged class. Furthermore, the servitude extended not only to the public but to the lesser members of the guilds themselves, who were bound by the ordinances of the guild officers. The case of Butlond *v.* Austen, reported in Select Cases in the Star Chamber, 262, shows this hardship.

The case arose in 1507 under the Act of 1504. The plaintiffs, who were Founders of London, complained that the defendants, being officers of the guild, made a trade regulation that no one should sell wares below a certain price to any one not a member of the guild. By this regulation the lesser guild members were forced

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to sell to Austen and his confederates at Austen's price, whereupon Austen resold at a large advance to the 'vtter vndoyng' of 'your seid suppliauntes.' Thereafter Austen was tried for illegal practices under the Act of 1504 and fined £40. Whereupon he 'embeseled sold and spent all suche money juels and goodes as belonged to seid hooll Felishipp the whiche they in tyme passed had of the gift of other well disposed persones.' As soon as the country became safe the guild monopoly cut both ways. Not only did the high prices, artificially maintained within the chartered towns, tempt capitalists to settle in the country where they were bound by no restrictions and thence undersell the city crafts, but the sums charged to journeymen to enter the guilds were prohibitory, and caused them to migrate.

The Statute of 19 Henry VII, c. 17 (1503), repealed the privileges granted by that of 11 Henry VII, c. 11, to Norwich 'Worsted Sherers,' because the guild would not permit any man to practise his trade in Norwich without 'grett & importable fynes.' In consequence 'meny of the shere-men lately inhabitauntes of the seid Citie be departed owt of the same Citie into the Contre, and so divers & meny howeses wythin the seid Citie be now unoccupyed & decayed . . . to the grete desolacion of the seid Citie.'

An example of the pressure of the fee-farm is offered by Gloucester, whose inhabitants as early as

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1488, only three years after Bosworth, petitioned for remission of their 'grevis fee firme of lxv. li.' The town complained that the bailiffs for some years back had been compelled to pay £30 'out of their own goods' to cover the municipal deficit, wherefore 'in a short time there will be no men left in the said town with sufficient means to fill the said office.'[1]

Finally the guilds decayed and were robbed; and the guilds decayed because, after Bosworth, Henry VII policed the open country. Fortified houses and armed retainers passed away because of the royal power to capture such houses, and with general security came economic competition. Men left the walled city burdened with debts for fortifications and churches, and harassed by the ferm, to establish themselves in villages such as Birmingham, Manchester, or Leeds. The statutes are filled with evidence as to how the growing pressure of taxation, caused by emigration, increased the municipal exactions, and how the increase of exactions stimulated the exodus of both capital and labor.

Naturally enough, Gloucester, when in such straits, collected money where it could, and in 1505 was in litigation before the Star Chamber for exacting illegal tolls upon the Severn. As police improved, decay went on always more rapidly through the reigns of

[1] Records of the Corporation of Gloucester, Hist. Manuscripts Com. 12 Report, pt. 9, p. 406.

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Henry VII and Henry VIII, as the Statutes at Large testify, and at length the guilds sank so low that in the first year of Edward VI (1547) their property was confiscated. They no longer could defend themselves. Finally the old municipalities became so poor that to save its taxes the government undertook to protect them. The Statute of 1 Philip and Mary, c. 7, passed in 1554, related in its preamble how 'before this time the ancient cities, boroughs, towns corporate and market towns within this realm of England have been very populous, and chiefly inhabited with merchants, artificers and handicraftsmen. . . . By reason whereof, the said cities . . . did then prosper in riches and great wealth and were as then not only able to serve and furnish the King . . . as well with great numbers of good able persons . . . meet for the wars, as also then charged and yet chargeable with great fee-farms, . . . and divers other payments, . . . which at this present they be not able to pay . . . but to their utter undoing; . . . but also the same cities . . . are like to come very shortly to utter destruction, ruin and decay; by reason whereof the occupiers, linen drapers, woollen drapers, haberdashers and grocers dwelling in the countries out of the said cities . . . come unto the said cities . . . and take away the relief of the inhabitants.' For these reasons and 'to the end the said cities may be the better able to pay the said

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fee-farms' Parliament forbade under severe penalties any resident of the country to sell his goods by retail within the cities unless he should be free of one of the city guilds.

These facts show that from the middle of the twelfth century to the beginning of the seventeenth free competition nowhere prevailed in England. Trial by combat had been restrained, and contract was limited by monopoly. Indeed society rested upon privilege and monopoly. Throughout several centuries the Crown raised most of its revenues by grants of monopolies made at the request of the moneyed class, and it was the enjoyment of these monopolies which enabled that class ultimately to secure ascendancy.

The social equilibrium became unstable with the failure of the aristocracy to maintain itself. The Crown soon shared the fate of the aristocracy, and the moneyed class being substantially unopposed from without began competition within itself. This competition was destined to change the whole complexion of civilization and of the law, and as usual the beginning of the revolution may be fixed by a judicial decision; Darcy *v.* Allein, 11 Rep. 84.

In the year 1598 Queen Elizabeth, following a long line of unquestioned precedents, and for the purpose of raising money, granted to Edward Darcy a monopoly of the sale of playing-cards for twenty-one

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years, beginning June 13, 1600, in consideration of one hundred marks per annum.

In 1600 the plaintiff alleged that the defendant sold playing-cards within the realm, in contempt of these letters patent, whereby the plaintiff was disabled from paying his farm rent. The defendant pleaded that he was a freeman of London, and of the Haberdashers Society, and that he sold the cards, the same being made within the realm, as he lawfully might. The plaintiff demurred. The Court of King's Bench held unanimously that the grant was void as against the common law. 'The sole trade of any mechanical artifice, or any other monopoly . . . is for the private gain of the patentees; and although provisions and cautions are added to moderate them, . . . it is mere folly to think that there is any measure in mischief or wickedness.'

Thus Darcy *v.* Allein serves as it were as a pinnacle from whence the observer can follow the whole sequence of legal development. It was the turning-point. The great industrial expansion which created the chartered towns began about 1150, and, attaining full vigor during the early thirteenth century, raised the energy of London so rapidly that its alliance with the barons in 1215 forced Magna Charta from John. Two generations later, this movement having culminated, its effects were manifest throughout Europe. In France the wager of battle was abolished by Saint

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Louis, and in England, shortly after, three events happened of capital importance in the law. In 1285 Parliament enacted the Statute De donis to protect landed estates from usurers. In 1297 London, rising against Edward I, as it had done against John in 1215, coerced him into the Confirmatio Chartarum, by which the Crown abandoned the pretension to tax without consent; and this victory of the urban interest was followed shortly by the establishment of the writ of præmunire. The issuance of this writ was probably nearly coincident with the assumption by the Chancellor of judicial functions apart from the Council, for early in Edward the Third's reign the Chancellor apparently sat alone.

Then came the rise in power of the prerogative courts, culminating under Henry VII and Henry VIII. The function of the Star Chamber had been mainly the destruction of the aristocracy by the enforcement of process for debt and by confiscation of their estates. Their ruin consummated, the peculiar work of the Star Chamber was done. By 1600 it showed signs of decay. This was the date of Darcy *v.* Allein, and of the incorporation of the East India Company.

On December 31, 1600, the East India Company was organized. That date fixes the exact moment when the Eastern trade turned toward London. England then began her Asiatic career, and thenceforward

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the tide ran almost unopposed in favor of the economic man. Naturally he shaped the law to suit his own convenience.

In 1601 Queen Elizabeth surrendered the prerogative to grant monopolies. In 1640 the Commons abolished the Star Chamber.. In 1649 they killed the King. This was the work of the cities. As Lord Macaulay has observed: 'In truth, it is no exaggeration to say that, but for the hostility of the City [of London] Charles the First would never have been vanquished, and that, without the help of the City, Charles the Second could scarcely have been restored.'[1]

In 1688 the Stuarts were exiled. In 1694 the Bank of England was incorporated, and contemporaneously the Crown sank into a pensioner of Parliament without inherent energy. The economic class had become absolute, and they proceeded to revise the law. Their first step was to fix the period beyond which land could not be removed from commerce. In 1685, in the Duke of Norfolk's Case, 3 Ch. Cas. I, the perpetuity was held to be illegal beyond lives in being, and the Duke of Norfolk's Case was the first of a long series of noteworthy decisions made by Lords Macclesfield, Hardwick, and Mansfield. What, however, concerns us most is a judgment in the King's Bench in 1711 in which, in Mitchel *v.* Rey-

[1] History of England, Harper & Brothers ed., 1879, vol. i. p. 328.

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nolds, 1 P. Wm. 181, Parker C. J. entered upon the modern controversy concerning contracts in restraint of trade. Parker's opinion marks an epoch almost as clearly as Darcy *v.* Allein.

I cannot now go into this earlier law, since its interest is impaired because of recent statutes. A few words of explanation must suffice. In the middle ages, while those whose aptitude lay in business rather than in war were confronted by a powerful armed class which threatened them with robbery, they combined for self-protection, and, suppressing competition among themselves, regulated prices and production for the common good.

Their power to do so rested upon an alliance with the Crown by which, in consideration of payments, they received grants of monopolies which the law protected. As the armed aristocracy decayed, and the open country became as safe as the town, internal competition broke out within this class, which had now become dominant. The abler guildsmen left their guilds and, establishing themselves in villages, undersold, ruined, and finally robbed their former friends, and then, to give their own peculiar genius scope, they suppressed the royal monopoly by judicial construction. A monopoly could still be granted by Parliament and was occasionally granted to powerful persons, like the organizers of the East India Company or the Bank of England. But such mo-

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nopolies were costly and hard to obtain, and private individuals could not as yet create monopolies unaided by government. Therefore these earlier litigations usually turned upon contracts by which one man sought to limit another man's freedom in competition. A partial restraint of trade was one which restrained the exercise of a business within a limited region, and was legal. A general restriction was one binding throughout the realm. This the courts would not enforce, as the judges thought it unreasonable for one in business in London, for example, to hinder another from entering the same business in York, where he could do no injury. With improved communications the possibilities of competition have increased and the old distinctions have been obliterated. You will find the modern English doctrine laid down in Nordenfelt *v.* Maxime Gun Co., 1894, A. C. 535; but, better still, you can read the history and the American law at once, in Judge Taft's learned opinion in United States *v.* Addyston Pipe Co., 54 U. S. Ap. 723.

According to the English and probably the American common law, to monopolize or restrain trade was not criminal; it was only illegal. To such a contract the courts would not give effect, but an attempt to monopolize was not a wrong which equity would enjoin. One of the earliest and most interesting cases of modern monopoly arose in 1871 in

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Pennsylvania over a dispute as to balances between the members of a combination of coal-mining companies. This combination undertook to fix prices for coal throughout the Eastern country. The case is the Morris Run Coal Co. *v.* Barclay Coal Co. 68 Pa. 173. The contracts were held void. Since 1871 the United States and several states have made such combinations and monopolies criminal; but in England, where the pressure of monopoly has been less, the old common law prevails, and is lucidly laid down by Bowen L. J. in Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, decided in 1892.[1]

Though doubtless the combination against the Mogul Line would in America be a criminal conspiracy under the Anti-Trust Act, the case is noteworthy as stating the limits of competition at common law. Probably now, even in America, such competition would be legal were the intent to monopolize commerce eliminated.

In substance the facts were these. In order to maintain freights on tea at Chinese ports, the defendants entered into a combination to limit cargoes. To this end they offered every one shipping by their vessels a rebate of five per cent, in order to drive competitors out of the trade. The plaintiffs were excluded from the combination, failed in consequence to get cargoes at remunerative rates, and were thus

[1] Affirmed, 1892, A. C. 25.

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likely to be ruined unless the courts intervened. The following paragraph from the opinion of Lord Justice Bowen suffices for my purpose: 'But we are told that competition ceases to be the lawful exercise of trade, and so to be a lawful excuse for what will harm another, if carried to a length which is not fair or reasonable. The offering of reduced rates by the defendants in the present case is said to have been "unfair." This seems to assume that, apart from fraud, intimidation, molestation, or obstruction, of some other personal right in rem or in personam, there is some natural standard of "fairness" or "reasonableness" (to be determined by the internal consciousness of judges and juries) beyond which competition ought not in law to go. . . . What is to be the definition of a "fair freight"? It is said that it ought to be a normal rate of freight, such as is reasonably remunerative to the shipowner. . . . All commercial men with capital are acquainted with the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future.'[1]

This decision legalizes trial by economic combat, as fully as did eleventh century law the judicial duel. The difference is that in the eleventh century the physical champion was favored, and in the nineteenth century strength and courage are rigorously elimi-

[1] 23 Q. B. D. 615.

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nated as factors in the conflict. In the one century as in the other the rules of the arena are devised to aid certain favored qualities. In the twelfth century the champion might not be waylaid or poisoned or molested by a confederate of his adversary. In the nineteenth century the financial operator is guaranteed against the vulgar crimes of cheating, forgery, larceny, intimidation, and the like, and especially against brute force. All else is fair. The weakest must succumb.

As the process of elimination of the unfit is similar in both ages, so is the result identical. As the exercise of private war raised a feudal aristocracy, so the rule in the Mogul Case breeds organisms like the Standard Oil. I may be mistaken, for I have not critically examined the evidence, but I am not aware that Mr. Rockefeller has ever transgressed the rules laid down by Bowen L. J. I apprehend that he is a man gifted for one species of combat much as was William the Conqueror for another, and that each has had his enemies. The vanquished always complain, with justice enough, doubtless, if suffering be considered, but we deal only with legal conceptions.

The crucial point for the lawyer is that, precisely as in a former age excessive fighting led to suppression of the combat, so in our age excessive competition leads to the monopoly. Monopoly may be reached by the survival of the fittest, as in the case

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of the Standard Oil, or by a combination in restraint of trade, as in the case of the Beef Trust, but the effect is the same. In the one case as in the other weak competitors are destroyed, and in the one as in the other the public passes under a servitude.

Before such adversaries as the Standard Oil or the Beef Trust, the individual is as helpless as was the purchaser before the guild, and just as Parliament uttered continual protests against guild monopolies in the fifteenth century, so has the American public protested through Congress and State legislatures as it has seen railway rates, food, coal, steel, leather, sugar, and a hundred other necessaries, fall under monopoly. Hardly an act upon the statute book is so redolent of terror as the famous Anti-Trust Act of 1890, 26 Stats. at Large 209.

In interpreting these statutes the courts have inclined to the view that all contracts made with intent to regulate prices, whether the prices fixed were reasonable or not, were prohibited, and that all attempts to monopolize trade or commerce were void. In the United States *v.* Trans-Missouri Freight Association, 166 U. S. 290, the Supreme Court held that any contract made by competing roads with intent to regulate prices, though 'for the purpose of mutual protection by establishing and maintaining reasonable rates,'[1] fell within the statute. Mr. Justice Brewer,

[1] 166 U. S. 341.

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one of the majority, has however since revised his opinion.[1] The point may therefore perhaps be considered as still unsettled under the Sherman Act.

In The People *v.* Sheldon, 139 N. Y. 251, the question came up on an indictment under section 168 of the New York Penal Code, making it criminal to conspire to commit an act injurious to trade or commerce. The evidence showed the Lockport Coal Exchange to be a combination of the coal-dealers of Lockport to stop excessive competition, to regulate the trade, to prevent giving short weight or over weight, and to steady retail prices upon a basis of a fair advance over the wholesale prices in Buffalo.

It was proved that before and at the time of the combination excessive competition had reduced the price of coal below cost, and that the business was carried on at a loss. It was not shown that the prices fixed by the combination were other than reasonable, or more than sufficient to pay the contracting parties a reasonable return. Upon these facts the court held the conviction supported by the evidence.

'If a combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce . . . although the object of the combination is merely

[1] See Northern Securities Co. *v.* United States, 193 U. S. 360.

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the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. . . . We are of opinion that the principle upon which the case was submitted to the jury, is sanctioned by the decisions in this State, and that the jury were properly instructed that if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal and justified the conviction of the defendants.'

Further than this, it has been decided that not only is the conspiracy to monopolize illegal, but that it is illegal to form a corporation, which is a single person in the eye of the law, if the object of the incorporation is to create an organization which will restrict competition.

This was established in Illinois in the case of the Whiskey Trust. The first pool was organized in November, 1881, when the price of whiskey stood at $1.15. In March, 1888, it had fallen to $1.04. In 1890 the trust was reorganized, because of decisions adverse to the legality of the combinations called trusts, into a corporation called the Distilling and Cattle Feeding Company with an Illinois charter. In 1893 this corporation fell into difficulties, and in 1895 the Supreme Court of Illinois ousted its charter upon Quo Warranto brought against it by the State. The Court declared it to be the law that: 'There is no

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magic in a corporate organization which can purge the trust scheme of its illegality, and it remains as essentially opposed to the principles of sound public policy as when the trust was in existence. It was illegal before and is illegal still, and for the same reasons.'[1] A like construction has been given to the Sherman Act.[2]

As I have observed, this rigor comes from fear. In their dread of servitude the people of the United States attempt to enforce competition by indictment or injunction, but they fail. In spite of a long series of decisions, of which perhaps the Northern Securities Co. *v.* United States, 193 U. S. 197, and the Addyston Pipe Co. *v.* United States, 175 U. S. 211, are the most famous, railway combinations and mergers, and trade monopolies not only survive but flourish. Nor logically can it be otherwise.

Suppose competition be forced to the end, it must result in monopoly by survival. Suppose competition to be checked to protect the weak, combination to control prices must result. The Lockport coal combination was held to be as vicious as any other. That was the ground taken by Popham three hundred years ago; there is no 'measure in mischief or wickedness.'

[1] The Distilling and Cattle Feeding Co. *v.* The People, 156 Illinois 448–491.

[2] Northern Securities Co. *v.* United States, 193 U. S. 197.

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By means of the railway, the telegraph, the telephone, electricity, and a hundred other inventions, men can now make a combination which shall cover the whole country as perfectly as under Edward III they could cover a town. Such combinations accordingly are made, and in the United States now, as in England then, legislation inclines to vest in the government the control of the prices of articles subject to monopoly. And furthermore this movement must almost inevitably be coupled with a demand for state ownership of public utilities.

No more important controversies could be presented to lawyers; for, carried to their logical end, these tendencies may not impossibly work almost as thorough a subversal of our present legal conceptions as did the passage from trial by combat to trial by jury in the legal conceptions of the twelfth and thirteenth centuries.

State ownership opens up many grave problems, to only one of which I can allude. State ownership of railways, for example, implies the transfer of vast masses of property from private individuals to the public, and these transfers sometimes end badly for the weaker party. In theory we deny that confiscation occurs under our laws, but in fact confiscation forms a regular branch of our jurisprudence which the courts undertake to supervise.

The most superficial acquaintance with history suf-

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fices to convince the reader that property which is obnoxious and ill defended is generally confiscated; and if obnoxious property escapes confiscation it is because of the vigor with which attack is repelled. Thus conventual property in England was confiscated because the monks were weak and rich, the guilds were robbed because the guilds decayed, in the French Revolution the nobility lost their land because they were first expelled, and precisely the same thing happened to the Tories in the American Revolution. They could not maintain their ground, and were wealthy. In the Civil War the slaves were confiscated because slavery was obnoxious though very well defended; and even in times of tranquillity private ownership is rarely respected when the property is, for some reason, unpopular, and the possessors thereof feeble relatively to the prejudice against them.

I will give one or two examples. Formerly the liquor business was a legal and reputable calling. A considerable amount of money was invested in distilleries. At a given moment the temperance agitation supervened, and laws were passed making the sale of liquor criminal and closing distilleries, without compensation to the owners. These arts were resisted as unconstitutional. In 1856 the question came up in New York in Wynerhamer *v.* The People, 13 N. Y. 378, and Comstock J., in an opinion which is a model of

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lucid and logical reasoning, demonstrated that 'To say . . . that "the law of the land" or "due process of law" may mean the very act of legislation which deprives the citizen of his rights, privileges, or property leads to a simple absurdity.'[1] Doubtless Justice Comstock does show a logical absurdity, but by doing so he proves that the law is not a logical system, but a resultant of social forces. The liquor business being obnoxious and ill defended, the courts abandoned it to its fate, and generally held that property in liquor may be confiscated. In Mugler *v.* Kansas it appeared that Mugler and others had invested money in breweries which were protected by law at the time of their construction. Afterward the legislature of Kansas passed an act making brewing criminal, directing the courts to close breweries by injunction and commanding the sheriff to abate the nuisance by destroying all liquors, or other property used in maintaining said nuisance. It was proved that the buildings were intended only for the purpose of brewing, and to close the breweries without compensation would deprive the owner of the larger part of his possessions. Comstock J., eminent counsel insisted, had established that, to the eye of reason, this was confiscation; but the Supreme Court of the United States held that this destruction of breweries by Kansas did not deprive Mugler of his

[1] 13 N. Y. 392.

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property without 'due process of law' within the meaning of the Fourteenth Amendment.[1]

Chicago as the centre of the slaughtering business is encumbered with offal which can with difficulty be disposed of. To relieve Chicago certain persons were encouraged by the Illinois legislature to erect a rendering establishment, called the Northwestern Fertilizing Company, at a distance of thirteen miles from the city, in a lonely, swampy, and desolate spot, unlikely ever to become thickly settled. To induce these persons to consider the project the legislature provided that the company should enjoy its franchise for fifty years. Relying upon this enactment, the Fertilizing Company erected buildings at a cost of $250,000, and conducted their operations to the public benefit for several years. Finally a village grew up in the neighborhood whose inhabitants, complaining of the nuisance caused by the carting of offal, passed ordinances intended to close the Fertilizer. The Supreme Court of the United States held that although the value of the investment was destroyed, the action of the village did not amount to a taking of private property for public use without compensation. The owners had no redress. Strong J. dissented in an opinion resembling that of Mr. Justice Comstock.[2]

It would be superfluous for me to point out that,

[1] Mugler *v.* Kansas, 123 U. S. 623.

[2] Fertilizing Co. *v.* Hyde Park, 97 U. S. 659.

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in this controversy, the fault of the owners of the Fertilizer lay in their weakness and in their over-confidence in an implied legislative promise; not in any wrongdoing, either moral or legal.

Instances almost tantamount to confiscation occur under the tax laws, especially through the enforcement of regulations in Western cities concerning betterments,[1] but possibly the most illuminating examples of the phenomenon are to be found under the gaming laws. The lottery has sometimes been adopted as a means of raising revenue, but on the other hand the lottery is hateful, and the stronger the prejudice the more arbitrary the exercise of power.

Formerly the lottery made part of the fiscal system of the State of Kentucky, and was especially used to raise funds for education. As early as 1859 the Court of Appeals held that where the right to sell a lottery had been bought from the State, and where consideration had been received by the public and obligations had been incurred by the purchaser, the contract was binding and, under the Dartmouth College decision, could not be impaired by the legislature.[2]

In 1838 the Kentucky legislature granted to sev-

[1] Davidson *v.* New Orleans, 96 U. S. 97. See also the attacks made upon foreign corporations by Ohio under the 'Nichols Law,' and by other states in imitation of Ohio. Adams Express Co. *v.* Ohio, 165 U. S. 194, and same case on rehearing, 166 U. S. 185, Adams *v.* Kentucky, 166 U. S. 171.

[2] Gregory *v.* Trustees of Shelby College, 2 Metc. 589.

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eral citizens of the town of Frankfort permission to conduct a lottery for the support of the schools. In 1872 this act was so amended as to allow the town, in its corporate capacity, to sell the privilege of the lottery as a means of raising revenue; an obvious advantage to Frankfort, as the tax thus levied was largely extra-territorial. In 1875 the lottery was sold, and in 1878 the Attorney General tested the validity of the contract by bringing a writ in the nature of a Quo Warranto against Frankfort, with the object of closing the lottery, then owned by one Stewart, under the gaming laws. Upon argument the Court of Appeals held the contract for the maintenance of the lottery to be valid and binding, and capable of being enforced as a legal obligation. Stewart having died, Douglas, by contract with his wife as sole legatee, and relying upon this legislation and these decisions, 'made contracts and incurred liabilities involving large sums of money,' acquiring Stewart's rights and assuming his liabilities. It was admitted that, in carrying out the lottery contract with Frankfort, Douglas and Stewart had paid Frankfort full consideration, and had exactly performed all their engagements.

In 1891 Kentucky adopted a constitution forbidding lotteries, and in January, 1892, the legislature by joint resolution directed the Attorney General to take such proceedings as might be necessary to close all lotteries. Upon the case of Frankfort being pre-

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sented for adjudication the Court of Appeals held that Douglas might be deprived of his property without compensation, as an exercise of the police power of the State. The Supreme Court of the United States affirmed the judgment of the Court of Appeals.[1] You perceive that here the goods of the citizen were confiscated in spite of every guaranty which could be given him by legislatures or courts, because the voters of Kentucky changed their views on taxation, making that criminal which previously had been not only protected but encouraged.

These examples suffice for my purpose, and I now propose to go back a generation, to the beginning of the controversies relating to monopolies, and examine the attitude of the courts in regard to certain powers of the government, long before social conditions had become acute.

In 1869 the legislature of Louisiana incorporated seventeen persons under the name of the Crescent City Live Stock Landing and Slaughter House Company. The act gave the company the exclusive right to maintain slaughter houses, yards for cattle, and wharves at which cattle intended for sale or slaughter should be landed, within the three parishes of Orleans, Jefferson, and Saint Bernard, having together an area greater than the State of Rhode Island. All persons slaughtering cattle in these yards were to pay

[1] Douglas *v.* Kentucky, 168 U. S. 488.

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at a fixed tariff, and to surrender certain portions of the animals.

The slaughter houses so authorized were not confined to any particular locality, but might be established in any part of this extensive district, provided they were built beyond boundaries indicated in the act. After June 1, 1869, all other landing places and slaughter houses were suppressed under severe penalties. The butchers of New Orleans and elsewhere brought 'some hundreds of suits,' alleging that this legislation violated the Constitution of the United States. A decision adverse to the plaintiffs was rendered in Louisiana, and the Supreme Court in Washington afterward on error sustained the validity of the act.[1]

The grounds of this decision are, at the present moment, of much interest. The Slaughter House enactment was confiscation, on a large scale, by a naked and corrupt assertion of power, undisguised by any particular justification through convenience, much less necessity. Upwards of one thousand persons were affected in their means of earning a livelihood, and a number of slaughter houses were closed without compensation to their owners, and without the owners being given even the privilege of saving some part of the loss by removal. No reason connected with health could be advanced, for not only was no evidence adduced to show that the slaughter houses

[1] Slaughter House Cases, 16 Wall. 36, decided in 1873.

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then existing were ill placed, but, by the admission of the government, the larger portion of the region closed to competition was adapted to the business of slaughtering. Furthermore, so far as the permission to slaughter in the new houses went, it was to many sufferers nugatory, since the distance from end to end of the parish of Jefferson alone is fifty miles, and a butcher coming from a remote point in the district would have been obliged to begin his trade anew.

In a dissenting opinion Mr. Justice Field observed: 'If [such privileges] may be granted for the landing and keeping of animals intended for sale or slaughter, they may be equally granted for the landing and storing of grain and other products of the earth, or for any article of commerce. . . . They may be granted for any of the pursuits of human industry, even in its most simple and common forms.'[1]

This law may be applied to existing facts. I am not aware that the power of the United States is less over interstate commerce than is the power of the states over their domestic commerce. Every navigable stream, highway, public road or letter-carrier's route, every railway, telegraph or telephone line, by means of which commerce is or may be carried on without interruption between two or more states, is an avenue of interstate commerce.[2] Over all these

[1] 16 Wall. 89.

[2] The Daniel Ball, 10 Wall. 557, is the leading decision, and has been followed and extended in numerous cases.

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avenues the United States has plenary jurisdiction, and may police them with the army and navy should the public welfare require it.[1]

The United States may charter corporations to carry on interstate commerce, and may take land for the use of such corporations, by eminent domain, without the consent of the State wherein the land is situated.[2] Over the character of the commerce traversing these avenues the United States has full supervision. It may prohibit the transmission of commodities injurious to the public safety or morals, or confiscate such commodities in transit.[3] It may annihilate foreign commerce, in time of peace, by embargo.[4]

The United States may fix, under certain limitations, the prices to be charged by railways,[5] and by parity of reasoning the prices to be charged by any other monopoly controlling necessaries of life, and engaged in interstate commerce. Finally the Supreme Court has decided that the business of the great meat-packing houses is interstate commerce.[6]

As a proposition of law it would appear to be clear

[1] In re Debs, 158 U. S. 565.

[2] Luxton *v.* North River Bridge Co. 153 U. S. 525.

[3] The Lottery Case, 188 U. S. 321.

[4] United States *v.* The William, 2 Hall's L. J. 255.

[5] Interstate Commerce Com. *v.* Cincinnati, N. O. & Texas Pac. Ry. 167 U. S. 479.

[6] Swift *v.* United States, 196 U. S. 375.

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that supposing public sentiment should demand the confiscation of the meat monopoly, as it demanded in Kentucky the confiscation of lotteries, Congress, under the Slaughter House decision, could close all the establishments of Swift and the Beef Trust, make the further prosecution of their business criminal and, without paying compensation to the sufferers, open slaughtering and meat-packing plants under government supervision, with prices regulated by statute.

From these authorities I apprehend that we are justified in inferring that any property which becomes sufficiently obnoxious will be confiscated without very strenuous judicial opposition, or were such opposition made that it would be overcome,[1] and that the issue will be decided by force. Therefore, if monopolies become odious enough, they may probably be seized by the public without compensation,

[1] Dred Scott *v.* Sandford, 19 Howard, 393, decided in 1856 and overturned by amendments to the Constitution after the Civil War. Hepburn *v.* Griswold, 8 Wall. 603, decided January 29, 1870, in which one clause in the Legal Tender Acts of 1862 and 1863 was held unconstitutional; overruled, after the appointment of two justices in 1870, in Knox *v.* Lee, 12 Wall. 457, in which judgment was entered May 1, 1871. See also the progress of the Court in regard to the income tax in Pollock *v.* Farmers' Loan & Trust Co. 157 U. S. 429, when originally argued in March, 1895, and on rehearing, 158 U. S. 601, decided in May, 1895. Note especially the concluding paragraphs of the dissenting opinion of White J. as showing the obstacle which the pressure of New York capital overcame.

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or with inadequate compensation, to the owners, if the owners lack the physical force to defend them.

We may now proceed to consider the legal aspects of governmental regulation of prices. In England, where Parliament is absolute, no one disputes this power. In America, also, it was originally uncontested. In Massachusetts, under the Province Charter, the General Court acted repeatedly.

In 1711, when organizing an expedition against Canada, it was provided that neither wheat, bread, flour, rum, nor other articles mentioned, should be sold above ordinary prices because of the demands of Her Majesty's Service, and the legal prices were set forth in detail.

In 1720 an elaborate statute was passed 'to regulate the price and assize of bread,' with a schedule annexed, giving the weight of the penny, two-penny, six-penny, and twelve-penny loaf, according to the value of the bushel of wheat.[1]

In 1762, just before the Revolution, another detailed statute was passed 'for regulating the assize of staves, hoops, and shingles.' Canals, turnpikes, coaches, and grist-mills have always had their charges fixed by law. It was only when capital began to accumulate in quantities sufficient to monopolize or, in other words, to develop high power, that serious resistance to the

[1] A like act had been passed in 1696.

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authority of the legislature over prices began. Perhaps the first great case involving the monopoly of a necessity without a government grant was the Morris Run Coal Co. *v.* Barclay Coal Co. in 1871. Five years later arose the initial struggle on prices in Munn *v.* Illinois, 94 U. S. 113.

Before 1876 the grain trade had centred in Chicago, and all the grain reaching the city had, necessarily, to go to elevators for distribution to carriers. The number of elevators was limited, and the number of owners of elevators so few as to make combination easy. There being a substantial monopoly of the transfer of grain, shippers complained of extortion. The Illinois legislature established a tariff of charges for elevating grain. The owners resisted this tariff as being tantamount to confiscation, and forbidden by the Fourteenth Amendment. Chief Justice Waite, in an opinion which is historical, laid down the law very correctly, as it then existed: 'To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one. We know that this is a power which may be abused; but . . . for protection against abuses by legislatures the people must resort to the polls, not to the courts.'[1]

[1] 94 U. S. 134.

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This language affirming plenary legislative discretion in regard to fixing prices was reiterated in another case reported in the same volume. In Peik *v.* Chicago, etc. Ry. Co. 94 U. S. 164, the Chief Justice said: '5. As to the claim that the courts must decide what is reasonable, and not the legislature. This is not new to this case. It has been fully considered in Munn *v.* Illinois. Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change.' Such was the law in 1876, but in the next ten or twelve years the social equilibrium shifted. In 1876 the investment in railways, in round numbers, amounted to $4,468,000,000; in 1885 it had risen to $7,775,000,000, in 1890 to $10,020,000,000; and this is what occurred:

The policy of the railroads in rebates and local discriminations caused discontent, and several sharp rate schedules were enacted by different states. In 1885 some of these acts came before the courts, and in Stone *v.* Farmers' Loan & Trust Co. 116 U. S. 307, where a Mississippi statute was involved, the Chief Justice began to hesitate. He then observed, though dismissing the bill for an injunction, in commenting on the legislative power as recognized in Munn *v.*

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Illinois: 'This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law.'[1]

This was in 1885. In 1887 the country laid 12,876 miles of track, the greatest year's increase in the history of the Union, and between 1885 and 1890 the investment rose, in round numbers, $2,250,000,000. Accordingly in 1890 a decisive step was taken. Minnesota had established a commission and made its findings as to railway rates final. The constitutionality of this law was disputed in Chicago, Milwaukee, & St. Paul Ry. *v.* Minnesota, 134 U. S. 418, and the Supreme Court held the act void, as being in contravention to the Fourteenth Amendment. Justices Bradley, Gray, and Lamar dissented. Bradley J. observed: 'I cannot agree to the decision of the court in this case. It practically overrules Munn *v.* Illinois. . . . The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one.'[2]

From that time onward, as the social weight of the

[1] 116 U. S. 331. [2] 134 U. S. 461.

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railways has increased, so has the tenderness of the courts in regard to anything which may impair their revenue. Possibly the case which has gone furthest is Smyth *v.* Ames, 169 U. S. 466, decided in 1898, when the investment exceeded $11,500,000,000. Nebraska reduced freight rates within the State about twenty-nine per cent in order to bring them into relation with the rates of Iowa, which were said to be less than those of Nebraska by forty per cent. Several roads resisted, and the courts held the reduction to be confiscation. Within three years Mr. Hill bought the Burlington, one of the threatened roads, for $200 a share, thus fixing forever upon the people, upon the strength of this decision, the burden of paying interest upon one hundred per cent of water in the form of bonds, or double the sum ever actually invested. These great roads represented a vast power and were protected accordingly. The weak, like the brewer or the lottery seller, fare in proportion to their weakness.

In Brass *v.* North Dakota, 153 U. S. 391, it appeared that Dakota had fixed rates for elevating grain, which the defendant alleged were ruinous. He showed that he owned a small elevator which had cost about $3,000; that several hundred such existed within the State; that any one could build a similar elevator to his, for land was plenty; that he used the elevator to store grain for himself, and that the rates he charged were reasonable, such as always had been

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charged, and such as gave him only a moderate return upon his investment. The Court sustained the act by five judges to four, for Brass had not behind him a financial energy even equal to the stock-yards, as will presently appear. The substance of the decisions is that, for the present, the judiciary have assumed the supervision of legislation in regard to prices, allowing state legislatures such latitude as the pressure of the forces in conflict work out as their resultant. As this pressure varies, so does the attitude of the courts. Just now the judges nominally discriminate between different kinds of monopolies. The public service corporations which enjoy monopoly through a grant of privileges, such as eminent domain, are, in theory, if not in practice, less protected than stock-yards, elevators, or packing-houses, which rely on private enterprise and capital alone. The courts hold that railways may be regulated to any extent compatible with the enjoyment of a reasonable return upon the investment, but that the occupations in which the public have but an interest, such as the stock-yard, may be controlled only in respect to individual contracts. Provided the stock-yard treats each separate customer reasonably, the State may not establish a tariff to reduce profits, no matter how large they may be. With railways the State may do so, but the courts reserve to themselves the right to determine what are undue reductions, and Smyth *v.* Ames would

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seem to intimate that any reduction which threatened to reduce dividends might possibly be considered as undue.[1] Kansas passed an act regulating stock-yard charges, and when the Kansas City Yards resisted, the Attorney General contended that, since the yarding of stock was certainly a business in which the whole public had a vital interest, the legislature might see to it that no undue charge therefor was laid upon the people. In setting aside the act the Court took occasion to explain the difference between a stock-yard and a railway.[2]

'Now, in the light of these decisions and facts, it is insisted that the same rule as to the limit of judicial interference must apply in cases in which a public service is distinctly intended and rendered [such as the railway] and in those in which without any intent of public service the owners have placed their property in such a position that the public has an interest in its use [the stock-yard]. . . .

'He [the owner of the stock-yards] has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may

[1] Interstate Commerce Com. *v.* Louisville & Nashville R. R. Co. 190 U. S. 273, is interesting as showing how far the Supreme Court has gone in protecting watered stock, stock watering being a method often employed to indirectly raise rates.

[2] Cotting *v.* Kansas City Stock Yards, 183 U. S. 93, 95.

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not interfere simply because out of the multitude of his transactions the amount of his profits is large.'

These facts admit of but one conclusion. The law, like society, is in transition. Two potent forces are in conflict. On the one hand is ranged those who are economically strongest, few in number but of great ability, and of greater wealth. These own monopolies. Against them are collecting the weaker sections of the people who, because of monopoly, are passing into servitude. To emphasize the gravity of the conflict and the ferocity it may not impossibly assume, I shall cite to you a couple of examples of monopoly, the one taken from among public service corporations, and the other from the class of industries in which the public has an interest. The railway is the most important and best known of all public service corporations. I will therefore begin by a case of railway discrimination.

The railway rate is, in last analysis, a highway tax, and the most pervasive of all taxes; for in our civilization all necessaries of life are subject to transportation before reaching the consumer. But under our law as at present administered, the community with access to but one road, or to but one combination of roads, is subjected to practically unlimited and arbitrary taxation, from which there is no appeal. Many cases are recorded in the books; among others those

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of Savannah, of Chattanooga, of La Grange, and of Spokane. I will however select one, not as the most startling, but because the facts are simple, and the official report compact.

Danville and Lynchburg, Virginia, lie sixty-six miles apart, Danville being that much nearer the initial points in the West such as Cincinnati and Chicago, and therefore having so much less haul to pay for. Danville and Lynchburg compete, but Danville has access to the Southern only, while Lynchburg lies also on the Chesapeake and Ohio, which is managed by the Pennsylvania. Consequently, while the Southern hauled freight from Cincinnati through Danville to Lynchburg at the same price charged by the Chesapeake, the Southern charged Danville much more for the shorter distance. The Southern defended the practice in part on the ground that to reduce the Danville rates to the Lynchburg basis would compromise their power of ever paying dividends on $120,000,000 of watered stock, which thereby they maintained would be confiscated. The courts on appeal sustained the Southern's contention. The facts are thus stated by the Interstate Commerce Commission:

'The complainants [men of Danville] insist that not only does this discrimination in freight rates cripple the business industries already located at Danville, but that it prevents the establishment of

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new industries at that point. Several specific instances were given in which enterprises that might otherwise have established themselves there declined to do so by reason of the higher freight rates. Indeed, it is difficult to see how this discrimination could fail to have such effect. Every pound of raw material, every manufactured article, bears a higher rate to and from Danville than to and from Lynchburg and Richmond. Every ton of coal used at Danville costs considerably more than at either of the other points. There was said to be water power in the vicinity of Danville still undeveloped, and this might possibly to an extent overcome the disadvantages presented by the rate; but unless it should it can hardly be seen why an industry should establish itself there with the certainty of higher rates before it, rather than at Lynchburg but sixty-six miles away, where the lower rate could be obtained. The difference in freight rates alone would afford a fair profit upon many manufacturing enterprises.'

'When it is remembered that the basis upon which this excess was computed is from ten to fifteen per cent higher than Lynchburg, it will be seen that Danville is now paying not less than $50,000 a year more than would be paid if as low rates were accorded to it as to Lynchburg. There is imposed by these transportation charges upon the business interests of that community a tax of $50,000 a year

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more than is imposed upon corresponding interests at Lynchburg. It is idle to suppose that Danville can long continue the active competitor of Lynchburg under these circumstances.'

Mr. Culp, the manager of the Southern, was asked 'what weight he gave to the interest of the city of Danville, to its proximity to Lynchburg, to the fact that it was a competitor of Lynchburg, and his reply in effect was, "None."'[1]

Such inequality causes the demand for a commission to fix freight rates. Discrimination against weak localities exists over three quarters of the Union, and the weak who are suffering insist upon a tribunal to protect them from the strong. The right and possibly the duty of government to regulate, to a greater or less extent, such monopolies as railways, is generally admitted in theory, however imperfect the regulation may be in practice; but the principle of fixing prices in other departments of trade is vehemently denied. Nevertheless, as a legal proposition, classes of occupations cannot be separated. The question turns upon the maintenance of a monopoly of a necessity. To make this clear I will quote a few lines from the brief of Attorney General Moody in the case of United States *v.* Swift:

'The facts show a combination which restrains or

[1] City of Danville *v.* Southern Ry. Co. 8 I. C. R. 421, 582, 584, decided Nov. 1900.

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monopolizes trade or commerce and operates upon and directly affects interstate or foreign trade or commerce.

'The combination or conspiracy which the Government is seeking to destroy . . . is one between all the principal American producers or packers of fresh meats for the purpose of jointly controlling the market for those products throughout the entire United States so as to maintain uniform prices therefor and destroy competition in the sale thereof to dealers and consumers. The combination set forth in the bill is in restraint of trade, for if in the entire field of the law concerning monopolies and restraints of trade there is a single proposition to which all courts now yield assent, it is that a combination, conspiracy, or agreement between independent manufacturers or producers of a necessary of life to fix and maintain uniform prices for their products, or otherwise to suppress competition with each other, is an unlawful restraint upon trade. . . .

'As yet no responsible voice has been heard to justify, legally or economically, a conspiracy or agreement between nearly all the producers of a commodity necessary to life by which the confederates acquire absolute control and dominion over the production, sale and distribution of that commodity throughout the entire territory of a nation, with the power, at will, to raise prices to the consumer of the

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finished product and lower prices to the producer of the raw material. Yet such is that now at the bar of this court.

'That there is a conspiracy to control the market of the nation for fresh meats, that it does control it, and that its control is merciless and oppressive, are facts known of all men.'[1]

The Supreme Court sustained the government and enjoined the trust, but no one longer believes that injunction can destroy monopoly. Men can hardly be coerced into competition, for the evidence of unison can be suppressed. Even could they be so coerced, the effect would be ultimate consolidation by survival. Indictments under the Sherman Act against the beef conspirators are now pending, but convictions, supposing them obtainable, would be, in the long run, little more effective than injunctions. Competition must apparently work out inexorably. Meanwhile the legal aspect of monopoly has thus been elucidated by the Supreme Court:

'It is enough to say that the idea of monopoly is not now confined to a grant of privileges. It is understood to include "a condition produced by the acts of mere individuals." Its dominant thought now is, to quote another, "the notion of exclusiveness or unity"; in other words, the suppression of competition by the unification of interest or management,

[1] United States *v.* Swift, 196 U. S. 385, 390. (Argued 1904.)

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or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be " unified tactics with regard to prices." It is the power to control prices which makes the inducement of combinations and their profit. It is such power that makes it the concern of the law to prohibit or limit them.' [1]

This masterly definition illuminates the phenomenon of the passage from contract to servitude. Freedom of contract being gone, the prize at stake is the control of this unity which fixes prices, for he who can make prices for necessaries commands the whole wealth of the nation, precisely as he who can tax. In the struggle for this prize two forces are engaged — the people in their corporate capacity, and sundry groups of capitalists, culled by natural selection, and favored, at present, because of their strength practically, though not avowedly, by the law. With the moral or political aspects of this controversy, we, as lawyers, have nothing to do, for professionally the function of the lawyer is to accept that which exists and deal with exigencies as they arise. We are only concerned with the effect of the struggle upon the corpus juris, since the law, being the resultant of the forces in conflict, must ultimately be deflected in the direction of the stronger, and be used to crown

[1] McKenna J. in National Cotton Oil Co. *v.* Texas, 197 U. S. 129.

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the victor. Approached from this standpoint, various possibilities suggest themselves:

First, it has occasionally happened in the past that when two forces, like those now in action, have contended for mastery, they have been so evenly balanced that neither has been long supreme. In certain mediæval industrial cities neither the patricians nor the proletariat could permanently dominate, and disturbances resulted which proved ruinous. Such a situation approaches more or less nearly to anarchy, and, as law is then paralyzed, the position is one which lawyers may decline to contemplate, as lying beyond their sphere.

Secondly, the community in its corporate capacity may prevail. The law would then probably, inclining in the direction of the superior force, favor state control of public utilities, and tribunals would be empowered to regulate the prices of commodities subject to monopoly, as Parliament empowered the courts to revise the ordinances of the guilds. Such an eventuality merits the lawyer's attention, as upon him must probably devolve the chief responsibilities of administration, and upon his aptitude would largely depend success.

Thirdly, the owners of monopolies may maintain and improve their present advantage. In this case they would eventually gain complete mastery of the price making unity. This possibility is singularly suggestive to the lawyer, for it presupposes changes which to him are momentous.

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Monopoly, being at once the most lucrative and the least loved species of property, is eminently obnoxious to attack and hard to defend; therefore a somewhat narrow minority of citizens could with no certainty anticipate an undisturbed possession of a comprehensive system of monopolies such as those now developing. To enforce monopolies in the necessaries of life the owners might even be constrained to become the exclusive mouthpiece of the law, or, in other words, the Sovereign. To effect this would be difficult without shifting the basis of our institutions from consent to force.

Were such a contingency to arise, the opportunity for distinction offered to the lawyer of administrative capacity would be unrivalled, as to his lot would fall the remodelling of the corpus juris and putting it into operation when remodelled. Also the equilibrium of such a society might be unstable; if so, confiscations would follow any failure of energy on the part of the privileged class. On the attitude of the courts in such an emergency I have said enough; they would doubtless rise to the occasion in the future, as in the past; but whatever may be in store for us, if my inferences are sound, you may reasonably anticipate a considerable deflection of the law from its present path, while the community is passing from contract to servitude.

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LECTURE III

LAW UNDER EQUALITY OR INEQUALITY DEFINED

IN the preceding lectures law has been seen in the process of forming, and in operation, under past and present conditions of society; the question now is, what is this phenomenon itself which we call law? What is it that is the resultant of conflicting social forces? The current English and American definition, given a hundred and forty years ago by Blackstone, runs thus: 'Law is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and forbidding what is wrong.' That this is unsatisfactory has often been declared, but the definition is still accepted in Law Schools and in text-books around the world, and we cannot ignore it. That it is dangerous as well as unsound under modern conditions, whether of equality or of inequality, is worth pointing out at some length. *We* at any rate must get rid of it.

The chief objection is, that the definition as a whole naturally suggests, and in connection with Blackstone's context and the practice of the time clearly teaches, that the Sovereign of a people may be external, and by implication that the law begins

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with, and is founded upon, abstract principles. Its language indeed suggests a theocratic original; the definition, especially in connection with the discussion accompanying it, reads like an attempt to generalize the decalogue, with the substitution of the words 'prescribed by the supreme power in a state' for, 'And God spake all these words'; the analogy being plain, that the supreme power in a state is external to the people, as God is external to his people, and so declares the law forever. And now observe the actual language of the context. 'The general signification of law,' the author of the Commentaries says, is that of a 'rule of action dictated by some superior being.' It is true Blackstone says this in his preliminary discussion concerning law in general, before he has reached the subject of municipal law; but he finds the very type of all law in the words just quoted. The only difference he makes — and this in the very next sentence — between the 'general signification of law' and law 'in the more confined sense,' is that law in this latter sense consists of 'rules of *human* action or conduct.' There is no suggestion of any difference in regard to the Sovereign, on the point of externality. Indeed a little further on, where Blackstone is considering the 'law of nature,' he speaks in the same terms of all law. In a state of nature 'there would be no occasion for any other laws than the law of na-

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ture and the law of God. Neither could any other law possibly exist; for a law always supposes some superior who is to make it.' Blackstone's law was an echo of theology — theology too of the eighteenth century.

It is true that in the course of his remarks Blackstone finds occasion to quote Justinian's precept, 'Jus civile est quod quisque sibi populus constituit'; but he is making the quotation, not to show that the Sovereign must not be external, but to justify his own use of the term 'municipal or civil law,' as the law governing 'districts, communities, or nations.' The whole preliminary discussion is based on the proposition that human laws all depend upon the divine; and the conclusion is plain, in the absence, in a discussion of distinctions, of any suggestion to the contrary, that as the Author of the divine laws is external to those upon whom such laws are to operate, so the supreme power in a state, from which proceed the laws which are to operate in civil affairs, is external to the people. It is a fact to be noticed that the rule of conduct is prescribed by supreme power, not in *the* State, but 'in *a* state'; any state satisfies the definition. Plainly, if Blackstone's definition was to make any distinction at all, the point that there could be no external sovereign in his conception of law was important enough to require him to make it clear beyond a doubt.

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What the face of the definition and the context tell us, the practice of the time so fully exemplifies that one cannot be permitted to doubt that the definition was to be taken as consistent with the practice, or, more likely, as based upon it. Blackstone of course knew what was going on, at the very time of his definition, between Great Britain and her American colonies; could there have been a better time to repudiate external sovereignty? Blackstone gave no sign — his definition was given, it remained unchanged. The Commentaries were already famous at the time of the American Revolution; at home they were held an authority as the work of one who had been appointed a Justice of the Common Pleas in the year 1770, just after the Commentaries were completed. The dispute with America was a plain one. Parliament claimed the right to make laws for the colonies 'in all cases whatsoever'; America held that Parliament was an external power touching matters of domestic concern in this country, and severed her connection with the mother State.

The idea and the practice prevailed throughout Europe; everywhere on that side of the Atlantic the conception of law, in conformity with theology, included external sovereignty. The 'social contract' itself had been taken, even in England, to support absolute monarchy. Hobbes had held that, in virtue of that contract, interpreted by his idea of the State

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as the end and aim of all things social, the people had contracted away their rights in favor of the King. All this was object-lesson for Blackstone, and Blackstone was faithful to it. His definition can have but one meaning: it could be accepted by the autocrat of all the Russias.

A remark is proper here. The reason why a sovereign who is external is such, is not because the head of the State has his home beyond the sea; it is because he has no authority. 'Lynch law,' or the 'law' of a vigilance committee, proceeds from an external sovereign. The moment your external sovereign receives rightful authority, that moment he ceases to be external. The supreme power of the State is not, under American law, an external sovereign, if that power is justly exercised over a people.[1] It certainly is not external in any objectionable sense as it ordinarily exists in a state. Supreme power is but a necessary phase of organized society, of which every member is a part. In the nature of things the State is only (for the present purpose) what the word etymologically declares, a standing — a standing or

[1] The question between American 'imperialists' and 'anti-imperialists' so called, is simply what constitutes authority beyond the sea. Authority conceded, cadit quæstio. Assuming authority, all agree that the Sovereign is not external; on that accepted doctrine the subject of a correct definition of law here proceeds.

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holding together of the people; and that imports supreme power. It is external in reference only to individuals, as power always must be. Blackstone's definition would permit the power to be external to the whole body of citizens, whereas supreme power should be one with them, and nothing more.

It must further be particularly observed that the objection to the external Sovereign is, not that he cannot lay down law — whatever the courts will enforce is law, because it binds — the objection is that his control is dangerous, that the law he lays down is a bad kind of law, likely to result in disorder and revolt.

The definition is also unsound in detail. 'Law is a rule of civil conduct.' This statement, taken as a whole, is indefinite where one is entitled to call for definite information. One may well expect the definition to tell us on what ground the rule of civil conduct is based. Is it based upon some eternal principle, or on convenience, or on power? No answer on the face of the definition is given. The word 'rule' too, well enough if understood as probably it was intended, needs explanation beyond any it receives. Besides meaning regulation, rule naturally suggests requirement; and the words 'commanding what is right and prohibiting what is wrong' show that that is the intended meaning.

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Now much of the law, taken in a straightforward way of stating it — in the only language, it may be, in which it is expressed, especially in the case of a statute — may not be requirement at all. So taken it may simply be a grant of authority for acquiring rights which before had no existence except in the State. The legislature passes a statute authorizing a town to borrow money, to vote on giving bonds for a certain purpose, to become incorporated, authorizing the formation of trading corporations, or the doing any of a score of things, where no right whatever existed before. The word rule, in the sense of requirement, is inapplicable to such law taken only as it is stated, that is, in its own direct terms. A distinction should have been made, if not for the expert at least for the inexpert; and Blackstone was writing for the latter. He ought, it may fairly be urged, to have told those whom he was teaching that, in regard to laws granting authority, the word rule was applicable only in a collateral way, to the course, to wit, to be pursued in regard to the authority — that in its proper sense of requirement it meant nothing more than that the authority is usually subject to conditions to be complied with, and that as an incident third persons must respect it.

One may not unreasonably object, in the next place, to the word 'prescribed' — 'a rule of civil

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conduct prescribed by the supreme power.' By making that word part of his definition, Blackstone makes it necessary to the same; if there could be any doubt, the fact is made clear by what follows. Blackstone says that in using this term he means that the rule must be 'notified.' 'A bare resolution,' he declares, will not be enough. 'It is *requisite* that this resolution be notified to the people who are to obey it.'

Is it necessary to the existence of a law that it be 'notified to the people'? If it is, then the American colonies had very little law. At that time legislation was printed but fitfully, and then only in part; and the decisions of the courts were never published at all, or published only of some case calculated to create public excitement — an unusual thing. Are the people of our territories, where the law, at any rate the judicial law, is seldom published — are they without law? And what is to be said of the people of our smaller states, like Rhode Island and Delaware, where the decisions are published only at intervals of several years — only when the accumulation is enough to make a respectable volume? Are these decisions meantime of no general force? Even in the large and populous states, where statutes and decisions are published at very short intervals, there is much law that is not prescribed.

What statute or decision ever prescribed that no

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one may take another's property without permission? The fact that there is a law covering the case is indeed plain; but that is not because it has been prescribed in any law book or other publication. To prescribe indeed means more than to give requisite notice; even of that meaning it is barely patient. More properly it signifies to set down in direct terms, with fixed bounds. To leave a matter to inference is not to prescribe it. And then if it be said, as Blackstone seems to say, that much of the law not prescribed in law books is divine law, 'prescribed in revelation,' it must be replied that even in regard to that part the law has not been 'prescribed by the supreme power in a state'; though it must be admitted that where the Sovereign is external to the people the rule must be prescribed, for it is not that people's own 'rule of conduct.'

But in a larger and more important sense the word creates a false impression, especially of the making of what is known as common law. Common law is not laid down with fixed bounds; it is peculiarly a reflection of times and conditions of society, usually tardy, but following on and changing more or less accordingly. The times may, it is true, be a long dead level, untouched by serious social change; they may be as they were in Blackstone's day and for generations before. On the other hand they may be as they were in the first half of the nineteenth century; they

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may be as they have been since our Civil War; they may be as they are to-day, fairly revolutionary. With social, economic, or political change the law may change in substance; but even in a stationary condition of society, the common law will seldom have sharply drawn lines. Even its most definite rules are almost certain to have a penumbra — a penumbra which may spread back towards the rule itself until the whole field becomes indistinct; to be lighted up again perhaps by a new rule, with a new penumbra, subject to the same process. Examples come ready to hand even from comparatively stagnant times. There is Chief Justice Shaw's fellow-servant rule.[1] The penumbra was there; and now, what with statute and judge-made law, in the social changes which have taken place, the whole sky is darkened. There was again the older rule that false representation, even scienter, could not be a defence to contract. That seemed to be as hard and fast a rule as could be laid down; but even that rule, or perhaps I ought to say, that rule especially, had its penumbra, a veil spreading over from equity; and then finally common law judges replaced the rule with a better, the one they had refused to admit. Conversely, even the age-long darkness of savage rules in the criminal law has a lighter edge; there is

[1] Farwell *v.* Boston & W. Corp'n, 4 Met. 49.

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mocking of Tyburn[1] in wager of battle,[2] and the sky will clear.

Blackstone's word 'prescribed,' taken as words of definition should be taken, in its natural sense, would deny this common quality of judicial law. A definition of law need not declare that laws have a fading border land, but definition should not contradict the fact. You may define the sun without saying that that fiery planet is apt to make it hot for men in midsummer, but you must not use a word which would seem to say that it cools the air.

'Commanding' and 'prohibiting' are words out of place. There are few such words in our law; the most that can be said is that constitutions and statutes make use of them more or less; judicial law seldom if ever does. Certain legal precepts, such as mandamus and injunction, run indeed in words of command or prohibition; but a precept or a writ is not a law — it is only a direction made according to law. The law is general, the precept particular. Even if such instruments were laws, the fact would not justify the use of the words in question, for precepts of the kind are applicable to but few cases; they would make only a small part of the law. So in general of the decisions of the courts; taken

[1] Tyburn gallows.

[2] The last case was Ashford *v.* Thornton, 1 Barn. & Ad. 405 (1818).

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singly, these are not, properly speaking, law, they are merely according to law. They are particular, applicable to A and B, parties to a suit, while the law is general. The law may of course be seen in a decision; it may be stated in terms in it; but the decision, whatever its form, whether of command, prohibition, or anything else, simply falls within the law.

If it be said that the criticism is only one of words — that the law must be obeyed or unpleasant things may follow, and that therefore, in effect, the law does command and prohibit — the answer in the first place is, that for beginners the words are misleading, and in the second place that the statement at best is true only of portions of the law. In the case of laws conferring authority, as we have already seen, it is only in the course to be pursued in regard to the exercise of the authority that any command or prohibition can be said to be made. Surely the authority itself is given by law, though where it is confined to particular persons others may be said in some remote sense to be prohibited from interfering. The point is, that the law says that the town or the railway or other body *may* do the thing authorized; enough for the criticism that the town or other person has an authority, without being 'commanded' to do what otherwise would be unlawful.

As a matter of fact, Blackstone's definition makes

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the word 'command' suitable even to permission and so compels it to commit suicide; for he says that law 'commands what is right,' and according to his own explanation of the word, as will presently appear, whatever the Sovereign declares is 'right' — not morally but legally — and the declaration may be only a grant of authority. A man is commanded to do what he may do or not, as he pleases! Plainly Blackstone overlooked one part of the law.

The words 'right' and 'wrong' required Blackstone himself to justify them. In their natural sense when taken together as in the definition, and in connection with the words 'command' and 'prohibit,' they import things right or wrong in themselves, right or wrong in plain morals. But that is the very sense in which, as Blackstone explains, they are not to be taken.[1] In that sense the words fall, not under municipal but under divine law; rights 'which God and nature have established . . . need not the aid of human laws to be more effectively invested in every man than they are.' 'So that, upon the whole,' he goes on to say, 'the declaratory part,' by which he means the determining part, 'of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong.'

And now, having emptied the words of their natu-

[1] Of course that is true enough, but not with the consequences attached by Blackstone.

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ral meaning, Blackstone finds himself compelled to empty them of all meaning, or at least of all value for the purpose of a definition; for he says that as the words are not to be understood as referring to what is intrinsically right or wrong, their meaning must be found in the declarations of the Sovereign. Things are, within the purport of the definition, 'right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper for promoting the welfare of society,' etc. This 'municipal legislator' is the external Sovereign, and he acts as he thinks fit. There is no hint that changes in society affect the question of legal rights.

Whatever social order prevails in the State, Blackstone's definition must be set aside.

Is it possible in the teaching of the Law School[1] to find a trustworthy, working definition of law, as the term is understood in America? The examination of Blackstone's definition may have helped the way. We have seen that certain things should be rejected, and we have seen some things which should replace what is to be rejected. This cannot be reckoned as anything short of gain. The facts may be recounted:

1. A definition of a modern system of law should

[1] It is not to be expected that the courts will adopt a definition of the term, nor is it desirable that they should.

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not suggest that the Sovereign may be external. 2. The expression 'rule of civil conduct' is indefinite, and 'rule' should be explained. 3. The word 'prescribed' is unsatisfactory, whether in the sense that law must be 'notified to the people,' or that it is to be set down in fixed terms; it is enough, so far as any requirement of notice is concerned, that the law proceeds from the people; instead of being set down in fixed terms, it is a product of times and conditions, changing in light and shade and in substance accordingly. 4. The definition should not declare that law consists in commands and prohibitions. 5. It should not tell us that law is predicated of right and wrong as shown in the declarations of the Sovereign, without regard to changes in society.

It is proper however to state, that definition of a comprehensive term like law need not exclude things not intended to be covered by it; enough that it does not suggest them as within it. Such a definition is to be taken as including only what it affirms or fairly implies, taken in connection with any remarks accompanying it and relevant external facts. It is still more important to observe that no definition of the term municipal law can be trustworthy and useful which puts the term in a strait-jacket of hard and fast lines and specific dimensions. It would be 'perilous' indeed to put any such definition to use in the administration of justice. There are great inde-

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terminate forces in relation to law, and it should be part of a trustworthy and useful definition of the term to find the place for the play of them and make allowance accordingly; and that too in some larger sense than the play of mere light and shade. A correct analysis of the typical phenomena of law — a grip on things as they are — should lead to the desired result.

The first thing to be said is, that one must be careful not to be misled by figures of speech. We constantly use the term law figuratively, and properly enough; but in the present inquiry we must be on our guard against taking figure for fact. We say that the law authorizes or does not authorize one to do so-and-so, as though the law had personality; what we mean is that it is lawful or unlawful to do the thing. We say that the law deals with a question in such-and-such a way; what we mean is that the courts deal with it in that way. We speak of setting the law in motion; what in reality we set in motion is the machinery of justice, the courts. We may speak of law as the 'life' or the 'life-blood' of the State; the figure carries a certain true idea. But while language of the kind is inevitable with men of imagination, it must not be taken to imply that law is a distinct cause of things. Law is not life; life is behind the law — law is a reflection of social forces, and that through a refracting medium; it is the servant of

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the dominant power in society. Law is only another word for the very things, it may be, which in figurative language it is put as creating. Law does not, for instance, create relations of right and duty; law does not even make the relations binding, in any sense of a force distinct from those relations. The relations are necessarily binding in any organized political society; and that, so far, is municipal law. Relations of right and duty — a subject to be dwelt upon later — find their binding energy in the existence of the State; such binding energy is part and parcel of the same — the most essential part of it, not a product but a part of it. So it is that these relations go to make municipal law. What then is meant by municipal law must be found, not by supposing that law is something standing apart, but by considering the elements which go to make it.[1]

In the examination of Blackstone's definition we noticed two phases of law, in the first of which the law appears in the form of requirement, in the second, of grant of authority. Now requirement imports right and duty in corresponding relation; duty being the term evolved in recent times from the idea of

[1] In an organized state, right, duty, and law, subject to change in form and in substance, are coeval and coexistent, if what is said in the text is true; but of the three right alone (right as conceived by the dominant social force) is a true final cause.

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requirement or Blackstone's 'command' and 'prohibition.' A has a right of possession in land; B and all others are required to respect that right, that is, they are under a duty to A to respect it; and so there exists a relation of right and duty between A and other persons. A, again, has a right of contract against B; B must perform his contract, that is, he is under a duty to A to respect A's right; and so there exists a relation of right and duty between the two. Or we may equally well say, as before, of both cases, that a corresponding relation exists between the right of A and the duty of B, or of B and all others.

This is the great field of law; it is evidently what was in Blackstone's mind in framing his definition; it is what usually is in the mind of a lawyer in our day when he thinks of law.

What then is law in the sense, first, of the foregoing remarks in regard to relations of right and duty? The elements of the subject are now clear; they are right, duty, and a relation between the two. A clear understanding of these terms should bring us to the point which we have been so long aiming at, and furnish language of definition which shall present the theory on which the law is constructed.

What is meant by right in the sense in which the term is used in the law; that is, what is meant by legal right? Apart from so-called natural, fundamental rights, such as the right to live, and rights in

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all their elements strictly defined and not in dispute — that is, except as the question is narrowed already by law — the answer to the question is, whatever the judge, in his final word concerning a cause before him, decides. As a matter of fact most cases in the higher, especially in the highest, courts are cases in which the judges must decide the question of right. Such indeed is the complexity of human affairs that even natural rights and rights strictly defined may be drawn in issue so as to raise a question which must wait upon the decision of the judge in regard to the law of it.

But it is important to know what governs the decision of the judge. He is not permitted to decide a case arbitrarily; what then does in fact, or at least in legal theory, influence and determine his decision in regard to the particular right? What indeed, under the general, compelling, dominant force in society, is the sum total of influences determining his decision? For some of these influences, it is clear, may be quite personal, or sub-legal, such as the judge's own views of political economy, politics, ethics, or whatever else of the kind the case may suggest. Allowance must always be made accordingly. Bearing this fact in mind, the answer to the question what determines, or is assumed to determine, the judge in deciding the point of right is found in a general conception which may be put thus:

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Legal right, broadly, is what the dominant force in society, deflected more or less by opposition, requires or authorizes. As the term has been understood under conditions of equality, that is, as the courts under such conditions appear to have taken it in theory, it is based on the idea that, subject to existing rules of law and procedure, and the personal factor in the lawgiver, men should be free to live and carry out their reasonable purposes in any reasonable way they will, or, shortly, on the idea of freedom to do whatever is reasonable.[1] And taking the term 'reasonable' as meaning what the dominant force in society considers expedient and desirable, which must be its meaning in law, the same idea of legal right must hold of inequality, or whatever force becomes dominant in the State. The difference will be found only in the application of the idea to concrete cases; freedom to do what is reasonable must have narrower play under inequality than under equality. In either case, on the idea of freedom to do whatever is reasonable rests, in theory, the whole law of rights, natural, judicial, and legislative — 'in theory'; of the practice, the next lecture will speak.

[1] See Berry *v.* Donovan, 188 Mass. 353, 355: 'The right to dispose of one's labor as he will, and to have the benefit of one's lawful contract, is incident to the freedom of the individual, which lies at the foundation of the government of all countries that maintain the principles of civil liberty.' Knowlton C. J.

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All particular rights are founded upon this general conception, as well those in which a man has of his own volition limited his freedom, for instance by contract, as those in which he has not done so, as in the case of a man's rights against all the world. It matters not then, for the purpose of this inquiry, that particular relations may limit freedom; enough still that the general idea on which right is based embraces the particular one in which one's freedom may be cut down.

The State as well as individuals and bodies of men of course has rights, and in the same sense as in the case of individuals. On the part of the State, right, in the broad sense, is based upon the freedom of the State to live and carry out reasonable purposes in any reasonable way, whether by legislating for the welfare of the people, as in granting authorities, by entering into contracts, or generally by acting or abstaining, having regard of course to the rights, as the term has already been explained, of those who may be affected. And within the same general conception of right, the State, like an individual, may limit its own freedom of action by contract or in other ways.

Legal right accordingly enters into the definition of both laws of requirement and laws granting authority; legal right is freedom to do whatever is reasonable, under either of these heads.

Acting upon a right is in most cases a matter of freedom; to say that an individual, a corporation, or

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the State has a right to do anything reasonable is, by plain implication, to say that the individual, corporation, or State may abstain from acting upon the right. It is enough therefore to speak of rights to act; the rest is implied. There may be exceptions; for instance, of the right to live what shall be said? One may venture one's life — may lay it down for country; 'peradventure a man may lay down his life for his friend.' In America a man may *take* his own life; but may he make an attempt upon it and fail? The answer is not everywhere the same — the right might well be denied. It is at least doubtful in most of our states whether the right to live may be abandoned at will by attempting self-destruction. There is perhaps something more than an abandonment of a right in such a case; and so of other exceptions.

Again, in the idea of right as founded on freedom of action in the purposes of life, there is found place, in a definition of law of which that conception forms a part, for the play of light and shade already spoken of as a general manifestation of law; or rather, a definition of law founded upon that idea inevitably imports the play of light and shade thoughout the subject, in all its modes of adaptation to life.

What is meant by 'reasonable purposes,' 'reasonable ways,' and the 'welfare of the State,' must, as the words themselves fairly imply, be left open — the meaning must always remain open, whatever social

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force dominates — and, so far, the meaning of right, and hence of law, must be left indeterminate. And indeed rightly, for here is the great place for the 'play of forces' before alluded to. At the same time it is conceived that some gain has been made in pointing out the basis on which the law in actual operation appears to rest; that should indicate, as has already been intimated, on what lines of extension it should be expected to fall. But it should be clearly understood that what the courts finally decide must be accepted as 'reasonable' or as required by the 'welfare of the State,' as the case may be; any other view would make the law either a subject of abstract principles or a speculative matter, a thing in the air, rather than a proper influence in the affairs of men. The law on which the decision is based may be unsatisfactory, but men cannot safely disregard it. If it is unsatisfactory, the legislature may correct it. And the same is to be said of legislation; an act of the legislature cannot be treated as unreasonable except for the purpose of repealing or amending it. Such is the course of things in actual life; and that is what this lecture is dealing with.[1]

So much for right. Duty is only the complement of right in ordinary cases. What this signifies we have already seen; the right of one person ought to

[1] In the next lecture reforms of the law will be under consideration.

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be respected by others. A has a right of property or a right by contract; it is B's duty to respect that right; the right is in one person, the duty in another, and the two, the right and the duty, relate to the same thing and to each other. And this is as true of the State as of individuals. The State has rights in rem and in personam, and individuals owe a corresponding duty to the State to respect those rights; and conversely individuals have rights against the State which the State, except as expediency may be supposed to dictate, is in duty bound to respect.

But there is another aspect of the subject; right and duty may be united in the same person, in the case of the State. This is due to the necessity for remedial law; the State has the right, and it is the duty of the State, to protect its citizens from injustice. It has the right in virtue of its own interest and welfare; it has the duty in virtue of the interest and welfare of its citizens. If however the State has such a right — that is, a right the complementary duty whereof is also in the State — so has every citizen a right against the State to call for protection in time of need, and it is therefore the duty of the State to regard that right; so that, after all, right and duty are separated in different persons here as in other cases.[1]

[1] Of course every one has both rights and duties at once, but these are not complementary; they do not relate to the same thing — there is no relation between them.

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Before passing to the third element of law, the relation between right and duty, it is proper to notice that both right and duty are particular; they pertain only to the persons who are concerned with them, the particular person having the right, the particular person owing the duty (though this latter, as we have seen, may be each particular person in the State). It is clear therefore, from this point of view, as well as from the considerations heretofore presented, that neither right nor duty alone can be law. Law is general.

We have found it necessary already to say something in regard to the relation between right and duty; in taking these terms out of the category of abstract things and fixing them in individuals and in the State, we have seen that the two relate to the same thing, and ordinarily are separated between two persons. That makes a necessary relation between right and duty, or, what is the same thing, between the persons concerned with the same. A has rights against B; B owes corresponding duties to A. There is a relation of right and duty between the two persons.

Collateral as well as direct relations of right and duty may exist; indeed collateral relations of the kind arise almost inevitably from the direct ones. The illustration already used more than once, again serves the purpose. A and B are in relations of contract; those relations are direct. But each of the

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parties has rights against third persons in virtue of the contract; others may not interrupt the performance of the contract, except as interruption may be the result of acting reasonably upon their own rights. Here the relations are collateral.

But the same relations might exist between half a dozen persons cast in shipwreck upon an unknown desert island. The relations between such persons, though naturally legal, could only be voluntary; each might refuse to be bound.[1] In a state however the relations become binding in the very nature of things. It is part of the very life of the State, as we have seen, that complementary relations of right and duty, as already described, should be binding; the State would fall to pieces if it were not so. Legal relations become binding in virtue of the very existence of the State. And so we have law.

The result is, that municipal law, in the sense of requirement, signifies the existence of binding relations, direct and collateral, of right and duty, between men or between the State and men, arising in virtue of freedom to do what is reasonable.

[1] The case of a voluntary society, such as a debating club, which comes readily to mind, is not a true example, for the relations of the members are not of *legal* right and duty, except in regard to matters, if any, of property or contract. In their very nature the relations (with the exception named) are only moral and of imperfect obligation. *Force* is behind Law.

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What is meant, secondly, by law in the sense of grant of authority? In such cases it must be observed that there is, so far as the law itself is concerned, no such relation of right and duty as that just considered. Apart from the duty to conform to the conditions of the grant, which is only a matter of accepting the same, the only duty arising is the collateral one, that others shall not improperly interfere with the acceptance. The law granting the authority is itself only an *offer* of rights; until the offer is accepted there is nothing at all, or nothing but an offer; there can be no relation of right and duty. And even after the offer has been accepted there may be no direct duty, for the right may still be inchoate; something may remain to be done under the right in order to create any relation, other than the collateral one, between the one having the right and third persons — in other words, to bring into existence the other factor, duty. A town, for instance, has legislative authority to issue bonds for a certain purpose; the town accepts the grant and proceeds to have the bonds executed, but until the bonds are issued, or until some one becomes entitled to require the issuance of them, no duty can arise further than what may have been incidental to preparing the bonds. Laws of this kind are always legislative. Judicial grant of authority is not law; judicial decrees, being made inter partes only, lack, as we have seen,

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an essential element of law, generality. Judicial grant of authority is simply authority granted in virtue of power conferred by the State. The power may be conferred by law — authority exercised under the power is another thing; it is only according to law.

A certain phase of judicial law may at first appear to belong to this head. Judicial law permits a man to inflict harm upon another whenever it may reasonably be necessary or may reasonably be supposed to be necessary to do so. One is permitted, for example, to make false accusation of another on certain occasions, as in the reasonable protection of one's rights; judicial law permits a man to bring suit against another upon an unfounded claim, subject only to the payment of costs; and so of other cases. But permission or 'privilege' in such cases is not grant of authority. What is more, these are cases of the relation of right and duty, the right being original and not arising from any grant of authority; the person who does the harm owes to the one who suffers, the duty not to infringe the latter's right to exemption from needless disturbance. Such cases therefore belong to the law of requirement. And this is true, though the permission itself is not a right in the sense that it can be made the ground of an action, or the subject of a complementary duty — the person against whom the permission exists owing no duty to the other arising from the permission. The person owing duty is the

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person having permission; but that is enough to determine the place of permission.

Indeed judicial law is always in theory founded upon existing rights and permissions, as distinguished from rights and permissions arising under grant of authority, and so always involves relations of right and duty. Legislative law may of course be, and usually is, of the same nature.

Law in the form of grant of authority therefore signifies legislative authority, under which binding relations, direct and collateral, of right and duty, may be created, in virtue of the freedom of the State to carry on reasonable purposes in reasonable ways.

It remains to unite the two branches of the definition. This might be done perhaps by seeking out and applying some common term which would include both; but the result would be apt to be a loss of distinctness and so of practical usefulness in the definition. It is not worth while to work out a definition for the mere sake of it. A definition should in a few words give information of the properties of the thing defined, and so be helpful to those who may have occasion to turn to it. No attempt then will be made to find a common denominator; the two definitions will simply be joined together. Accordingly the following may be put as the general definition:

Municipal law signifies the existence of binding relations, direct and collateral, of right and duty be-

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tween men or between the State and men; or legislative grant of authority under which such relations may be created; each in virtue of freedom to do whatever is reasonable.[1]

Breach of duty in what may now be called original law gives rise to remedial law, creating, where the breach of duty is between individuals, that is, in civil cases, a new right of compensation, and where the breach of duty is between the State and individuals, that is, in criminal cases, a new right, not only in the interest of the State, but also in the interest of every member of the State, to have punishment inflicted, subject to pardon. And so there arises a new set of relations requiring a new definition, which may be put as follows:

Remedial law signifies the existence of relations of right and duty between the State and the members of the same, in consequence of a breach of duty, binding the State to enforce compensation in civil, and punishment, subject to pardon, in criminal cases.

Procedure, it may be added, signifies the means provided by the State for enforcing the law, original and remedial.

[1] Logic led the Benthamites to an impasse. A chief tenet with them was that every one should be free to do whatever he pleased, if he did not violate admitted law. But to contract, especially in combination, was to give up full freedom. To say that men are free to do what is *reasonable*, according to the predominating social order, leads to no deadlock.

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LECTURE IV

SCIENTIFIC METHOD IN LAW

TWO distinct schools have in succession held the field, more or less, of legal education in English and American law, the analytical of Bentham and Austin and the historical school, imported from Germany and founded at Oxford by Sir Henry S. Maine; though the first-named, conspicuous in England in its day, hardly played any part at all in America. Discussed here with interest some thirty years ago, as expounded by its more recent master spirit, Austin — Bentham had long been only a name — it was discussed on the whole adversely, and soon passed by altogether, to give place to the historical school, so far as any distinct school of legal ideas followed. In England too the school of Bentham and Austin failed to take root and has been entirely superseded by the historical school. The latter holds its place, wherever it has been received, in undiminished favor.

I will not attempt to set forth in detail the characteristics of these two famous schools; some one else perhaps will do that. It will be enough for my purpose to remind the informed, and to intimate to the uninformed, that the analytical school threw aside the

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teachings of history, except such as were permanent in nature — and these could hardly be called historical — and planted itself on its own conception of an inherent nature of rights and law. On that footing Bentham could serve up codes and constitutions according to taste. These were the palmy days of a priori law — for Bentham.

The name 'historical school' suggests what that school stands for. The law is to be found altogether in books; search the precedents, apply legal reasoning, and the result will be the law of a case not specifically covered by authority. Further, the historical school directs the student's attention to the study of legal history, as found in historical collections of precedent or other authority, as the true and main source of our present law. The whole of the past, as far back as the Norman era, is to be placed before the student, not because all of it, or the greater part of it, may be necessary to explain the judicial law of our day, but because there is one continuous stream of law from the earliest times to our own. The student is directed to the study of law as declared in former times because it is an earlier part of the stream — in that sense the source of law.

Without entering into details, it seems to me, in the first place, that the historical school, standing for the idea that the law is all found in the books, teaches the doctrine of abstract principles. All the law being

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found in books, the law there found governs; there is no place for conditions essentially different from those of past times. That is fatal. It seems to me, in the second place, that the historical school, in professing to teach existing law through history, confuses history with (what certainly should be taught) the sources of law in the proper sense of the word. Having regard merely to the existing law, legal history as such is for the historian, though history which throws light on the law as actually administered by our courts is a necessary part of a sound education for the bar. I shall come to that subject again.

I am persuaded that there is something better than either the analytic or the historical school, better than both combined — something which will adopt whatever is useful in each having regard to the actual conditions of life in our day, and will furnish besides much of first importance which they pass by; in a word, which, focussed upon the social centre of gravity, presents a sounder system of legal education; a suitable name perhaps for which is the Scientific School. Let me now endeavor to explain what I mean.

Municipal law is founded upon a certain conception of right. As was pointed out in the last lecture, that conception signifies, with certain limitations not now important, freedom to carry out one's reasonable purposes in any reasonable way; in short, to do whatever

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is reasonable.[1] In so far as the law fails to realize this idea, it fails of what I mean by a scientific result; to work the idea into fact on all sides would be to make the law wholly scientific — the law would then be in fact what it professes to be. It cannot be too much to say that the law should be constantly working to that end. What this means may not appear by the mere statement; as it is of the essence of the scientific spirit, it should be worth finding out.

One thing of importance stands out in clear lines — the law follows some conception of right. It is a mistake, as was noticed in the last lecture, a mistake growing out of taking figurative language for fact, to suppose that law is a distinct entity and cause of things. In a secondary way law may in certain cases be said to create rights; as where a grant of authority by the legislature to do what before could not lawfully be done has been accepted and acted upon; but this creative power of law itself springs from right, the right of the State to legislate for the welfare of the people. This appears plainly from the consideration that if the legislative act was itself unauthorized, that is, if the State has conferred no right upon the legislature, the legislative action confers no right.

As then law follows, or at all times endeavors to follow, the judicial conception of right, and right according to that conception signifies freedom to

[1] Ante, p. 154.

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carry out one's reasonable purposes, it results that law follows, or endeavors to follow, the reasonable exercise of purpose — law follows the pursuits of the people, so far as these are the dominating social force. That should be the conclusion; but fact halts on theory, sometimes only in appearance indeed — far too often in reality. At first appearance it would seem that the discrepancy was very great, great enough perhaps to cause one to question whether any such theory has a place in the operation of law. Indeed the law seems to be flooded with a priori rules — rules fashioned, if not before, at least with small regard to, the pursuits of men. How full of such rules the law of property appears to be; how many there seem to be in contract, in criminal law, in tort! Even equity contributes to the common stock; and the statute book and, still more, written constitutions furnish another supply. The first glance would put aside any theory that law follows, or follows with anything approaching consistency, men's pursuits; it would even seem to take from the doctrine that law follows its own conception of right all but a barely theoretic notion. But first impressions are apt to be untrustworthy.

I want to speak now, not merely to lawyers and students of the law, but to the less informed. I want to take the business man and the simple tradesman into my counsel and confidence; nay, I would fain

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speak to the wayfaring man, in language which I hope will go home to him as well as to his more fortunate neighbor. I would convert the rebellious laboring man to a better way of thinking of his country by showing him that its laws are after all much better than he is inclined to believe; that, laying aside the case of equality against inequality already considered, sound agencies are at work in the law, that the tendency is clearly towards improvement. I would give him a hopeful for a despairing view and turn his animosity to respect and confidence. Here is indeed the opportunity of the competent lawyer; it is in his power to give effective help towards saving the country from perils which now darken our skies. It is, I believe, within the power of the legal profession to improve upon the famous but inconsiderate Norman boast, 'Nolumus leges mutari,' by a saner, safer word of our own people, 'We will wait.'

I hope then, through those who hear me now, to speak to my fellow-men generally, as well as to those who will find my words familiar enough — familiar enough, no doubt, to be dispensed with — I hope to speak to the uninitiated, and shall use language which may not be so familiar to them, and hence may be worth using; but it must be language which they will in substance understand.

I begin then by saying that the objection laymen

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mostly raise, which in effect is that our laws do not conform to the pursuits of men — that they are largely a priori law, and so are not even founded upon experience — while containing some truth, enough indeed to give it plausibility, has not the foundation, and especially has not the hopeless aspect, which they give to it. It is, I am sure, something to say and worth making clear, that most of the rules of law which now appear to be a priori were in their origin adopted as the expression of the prevailing force in society, or, what is true of much of the law, adopted as being acceptable whatever might be the dominating force. These rules at first certainly followed the dominant pursuits of men, and hence, so far at all events, are consistent with sound theory. A few, well-scattered, but simple illustrations, drawn from affairs of every-day life, will enforce the point.

The first shall relate to property in land, the particular subject of annoyance to my layman neighbor. 'Are not these laws of real estate archaic?' asks my friend. Yes, some of them are — some of the most characteristic, some of those in most common operation. But if these are archaic, as they are, they are so because they are feudal or relate to feudalism; which is only to say that once they had in them the life of the time — they started out and lived for centuries on sound theory. And when at length that life began to die out, and the rules to become in

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effect a priori, remedies more or less efficient, perhaps I ought to say more or less blundering, but still well intended, were applied until finally little was left of the feudal idea but a shell — a lot of names and bare survivals, which will yet be dropped if lawyers are true to their calling and legislators are properly informed. 'But there is more than that in it,' replies my friend. 'Why,' he asks, 'should there still be differences between real and personal property, why for instance between the drawing of deeds and of wills in disposing of the two kinds of property?' As for the broader question, it should help the inquirer to a proper frame of mind to be assured that legislation is gradually removing the differences — that the tendency is right, and that therefore he may look with confidence to a future not far off when all but the essential difference between land and goods will have disappeared. Obviously the business must proceed with caution; to attempt at a stroke to settle the matter might be productive of more mischief than good. And then in regard to the particular question of the difference between wills and deeds: in so far as that question has not been answered already, it should be said that wills escaped in great measure the laws of feudalism by having been shut out of the feudal economy. Wills of land came into existence when the light of feudalism had gone out; and so the courts were per-

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mitted to administer the purposes of the testator with a comparatively free hand. The testator accordingly could devise his lands absolutely without the use of the troublesome language required in a conveyance by deed. The deed is in origin a feudal instrument, and is still clogged with some of the requirements of the time of the first King Edward; but these requirements have long since become in great part only a familiar formula of words, with which every one is acquainted and indeed satisfied. It is, in fact, doubtful whether our deeds of conveyance of the present day could be very much improved. The historic words, 'to the use' of the grantee, so potent originally and still of such legal significance, have a suggestion of meaning, which, if not the true one, is sufficient to satisfy the layman. The layman would not strike them out.

To pass on to another case, our neighbor balks much at certain phases of the law relating to the sale of chattels. The seller is made to warrant his wares, when in point of fact, as he declares, he has done nothing of the sort; here, he insists, is a plain departure from sound theory — the law which makes him warrant when he did not, either in intention or in the natural meaning of his words, that certainly is a priori law. And so it seems at first perhaps even to the lawyer. But the second thought is better, and our friend will be helped when informed

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that, artificial as the rule of warranty in sales of personalty is, it is after all no more than an adjustment of the balance made necessary by one of the layman's own rules, the rule that the buyer must take care how he buys — caveat emptor. The last-named rule is only a legal expression of the notion of sales by salesmen, who have in England and America been strong enough to insist that if they have committed no fraud in word or act the sale is good, though the seller knew, and knew that the buyer did not know, of facts affecting the value of the goods. The law has followed their lead, in most states, and made good the bargain notwithstanding the non-disclosure; that is to say, the law in such cases gives no redress to the deceived buyer. But that is hard; and to make things even, the law says that the buyer may regard any statement of fact made in the negotiation by the seller, touching the nature or quality of the goods, as a warranty unless he plainly refuses to warrant. The seller had too great an advantage under his rule of caveat emptor; the balance must be redressed. The situation might have been saved by having the rule of the sale run caveat venditor, as in the Roman law, ancient and modern; then there would have been no need of the judge-made warranty. But in that case the seller might equally say that the law does not follow the mandate; it is judge-made, a priori law. Here

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then, again, the case only needs proper explanation to reconcile it practically to the theory under consideration.

The rule of joint contract next objected to, as being artificial, contrived in the back of the head, is a more troublesome thing. That certainly does look like a priori dogma; lawyers themselves generally so regard it. But, objectionable as it is, it was founded on reasoning — reasoning from the feudal rule of joint tenure. If joint tenure was not to be severed (before statute) without consent of all the joint tenants, why should joint contract, especially when the parties were joint tenants, be treated differently? But the trouble is that the reasoning was away from the social centre of gravity; the feudal system was a thing of the past. The rule of joint contract has accordingly been one of the most mischievous things of our law, vexing courts and legislatures and everybody to this day. It is a perfect illustration of the effect of law acting out of touch with life — losing sight of the social equilibrium.

Merchants, we are next reminded, have a grievance with the doctrine of consideration in contract, where at any rate the contract is in writing; a man's signature, they say, should be binding; and eminent lawyers, like Lord Mansfield, have agreed with them. The answer, familiar enough to lawyers, is based on the economic idea that something should not be re-

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quired for nothing — that dealings import exchange of things real and equivalent. A man may presently give away what he will, if creditors are not to suffer from the gift; but a man should not bind himself to give in the future, with the uncertainties of it. He knows the present and may give accordingly; to bind himself to a gift in the future might ruin him. This reasoning is of course unsatisfactory to the merchants, on grounds peculiar to the need of the rapid transfer of pecuniary interests. But one of the chief grounds of objection has been removed in the final adjustment to or rejection of Chancellor Kent's doctrine of value; where that doctrine has been rejected, a creditor may now safely receive a negotiable instrument from his debtor, as security for a pre-existing debt. It is not necessary to try to discover a consideration to support the transfer; the merchants have prevailed. After this there can be little ground of complaint against the rule requiring consideration.

The criminal law is a good field for the layman's criticism and yields at once its example. He sees that branch of the law breaking down under his own eyes, in what many laymen believe to be its failure to reach out an arm it ought to extend; an arm however which long disuse withered in the socket.[1] It

[1] What in effect was the injunction was in use in England long before the Chancellor appropriated it. See Bigelow, History of Procedure, 192–196; also the references in the Index of

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cannot strike as it did at first, at power. Its blow was long ago paralyzed for the most important of purposes, by self-imposed limitations of procedure; and now equity, which always had been required to keep its hands off the preserve, finds itself compelled not merely to lend, but to take, a hand in the business of keeping the public peace. Yet the criminal law has of course always professed to do its own work; and the profession was until well within the last century fairly carried out. There was no need of the injunction; the jury answered the purpose fairly well, even if in a somewhat tardy and indirect way. And thus the very idea of prevention was so far lost sight of in regard to crime that it came to be understood that criminal law could not work except in the one way of the jury. And parliaments and constitutions, as well as judges, learned the negative lesson in the same way. Now, in our day, under social conditions unknown until within our own memory, with social upheavals throughout the land, breaking up communications, interrupting peaceful vocations, sometimes of the most solemn kind, and threatening not merely the peace but the very life of states, now at last, in

Placita Anglo-Normannica, sub voce Injunction; Pollock and Maitland's History of English Law, ii. 593, 594. The writs in *Placita Anglo-Normannica*, 105, 159, prohibiting disturbance of men exercising their rights, have a familiar sound, as if of recent events.

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the opinion of those most closely connected with peace and order, the judges, it is found that something must be done to replace the withered, dead hand of the criminal law. The past, with its stagnation, is not sufficient for the day when men, under a stronger social order, begin to assert themselves. The criminal law of Edward I or of Charles II or of George III will not do for the twentieth century; return to earlier usage is demanded. Nor is there any sufficient reason, if the case is to rest on the nature of things, why the law of the twentieth century should not be able to strike at power as did the law of mediæval England, with the injunction.

Still the criminal law has always sought, after its way, to protect men in their reasonable pursuits, and, so far as any general policy is concerned, without attempting to force them into this or that way of carrying them on, and so has professed to conform, and hitherto practically has conformed, to the theory in question. To-day, in times of social revolution, it is crying out for means of conforming to it.

That may be true, the critic perhaps will say; but as he thinks of the matter, the whole of the criminal law appears to him to be arbitrary and artificial. He wants to know why breach of trust in certain cases is a criminal offence while breach of contract is not; is there any consistent distinction running through the criminal law, which saves it from the charge of being

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haphazard? My friend does not object to a distinction between compensation and punishment; he knows that such a distinction has been well marked from the time when, according to a recent version of scripture, Adam and Eve 'lost their property.' The objection is only that the distinction is not carried out upon sound theory.

The answer must be given on broad lines. Our friend must be informed that the criminal law has two tap-roots — the first public defence, the second possession. In regard to the first, it will only be necessary to remind him that in early feudal times the chief danger to the King's government was the turbulence of the barons; their jealousies and enmities, accompanied, as they inevitably were, with depredations and slaughter, often leading to outbreak and war. Such things must be put down, or the King himself would be unseated; they must be put down and the offenders punished — to take their lands and goods would be part of the punishment indeed, but only part. It was of the same idea, extending with time, that all disorder, of whatever kind, was dangerous to the State and must be similarly dealt with. In the earlier times — my friend is well informed on this point — little if any discrimination was made between small and great breaches of good order, except in regard to the weight of punishment; but breaches of contract,

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among a people not engaged in commerce, were matters of small importance, not touching the King's welfare; and so redress in such cases was left to the injured parties in the way of pecuniary compensation. And in process of time the smaller offences against order detached themselves from the greater ones, as not tending to affect the State, and they, like breaches of contract, became the subject of compensation only, forming our law of torts. There is surely nothing arbitrary in this, so far as the idea of the whole is concerned; though in regard to details there might sometimes be ground for difference of opinion. It is not necessary to consider changes of theory in regard to the purpose of punishment.

The other tap-root, possession, involves some technical law; but the essential idea of it may readily be understood by laymen. Possession in primitive and indeed in civilized times is a conception closely akin to ownership. We still speak, in ordinary language, of a man's possessions in the sense of his property; that idea was very greatly intensified in early times. My friend will now anticipate the point — a man could not steal what, though only for the time being, was his own.[1] Hence the distinction of

[1] The modern way of putting it is, that larceny begins in trespass, that is, in *wrongful* taking possession; which is the same idea. A man could and can steal his own goods, if only they are in the lawful possession of another — such is the

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to-day between larceny and conversion; the man in lawful possession of another's goods, who wrongfully converts them to his own use, must make compensation, but cannot be punished as for crime, as he might have been had he not had lawful possession. Hence too the distinction in former times between larceny and embezzlement, a distinction now fortunately removed by statute — fortunately, because it is very important, under whatever social order, that embezzlers should be dealt with with the strong hand.

The criminal law is no doubt imperfect, but it began and still is proceeding, as far as it goes, on right lines, with a tendency more and more to plant itself on sound theory — perhaps to the injunction.

There is another difficulty laymen often feel, of a more general nature, which they would perhaps call an excessive fondness of the judges for reasoning, without due regard to what, if taken into account, might modify or even nullify the result. There is, I think, good ground for this complaint. The effect may be a true case of a priori law; that will be so when some just custom or practice, which might decide or materially affect the decision of the case, has not been considered. It is one of the boasts of our judicial law that it is a law of reason; and Sir Frederick Pollock, in the last of his lectures on The Ex-

potency of the old idea of possession. See Commonwealth *v.* Rourke, 10 Cush. 397, 399.

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pansion of the Common Law, has told us that this law of reason is the substantial equivalent of the famous law of nature in Roman jurisprudence. There may have been no ground to complain, among the Romans, that this law was sometimes expounded without sufficient regard to actual life; I do not know, but one may believe that the Roman jurists generally were very practical men, and would not be misled into reasoning not founded on the prevailing pursuits of men.

Be that as it may, it certainly cannot be said that our law of reason is always expounded with sufficient regard to relevant facts. Reasoning of the judges may not be 'in the air'; it is generally legitimate reasoning on the facts upon which it professes to proceed. It may be sound in logic; but the objection is that the judges have shut out inquiry in many cases into the habits or practice of men in the particular situation, and that the inquiry properly pursued would have brought to light facts which would have more or less vitiated the reasoning. There is ground for the objection; it applies particularly to branches of law which have sprung from the custom of merchants, such as the law of negotiable instruments, the law of insurance, and the law of partnership. Judges reason, in these cases, from common law doctrines of contract, a subject with which negotiable instruments and insurance particularly are much

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at variance; so much so, it should seem, that judges should at once be put upon their guard. Much a priori law has been engrafted upon the subjects named because of this tendency of the judges to reason from the common law. The dangerous feudal and anti-mercantile doctrine of joint contract, already referred to, has been fastened upon commercial instruments and partnership, as if of course, with all the evil train of common law consequences. In the law of insurance judges will, to refer to a single case, reason of warranty from warranty in the common law subject of sales, to the confusion of the whole doctrine as custom has it.

We must not boast too much of our law of reason. It is too apt to be merely logic, and to lose sight of the social centre of gravity as the proper compelling power. The limitations of logic, in the presence of social change — the dangers of it — should be plainly taught. The layman's complaint has a good foundation; the only answer to it is, that the judges, notwithstanding their excessive faith in reasoning, are faithful in intention to the proper administration of justice.

My friend brings forward still another subject of grievance which he, being a layman, can only define, for want of requisite technical learning, by saying that the proceedings of the courts are to him unintelligible, and often, he is certain, work to the defeat of justice. Practice and technicality, he says, constantly

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prevail over right. Putting the subject of complaint into one general term, his grievance is procedure. How much ground there is for the idea that procedure is out of touch with the fundamental idea of right so frequently stated in this lecture, at least how much procedure *has been* out of touch with it, every well-informed lawyer knows full well. Time was when lawyers and judges would not admit the fact, or would admit it only with the answer that the evil, such as it was, was necessary; it was far better to ignore or endure it than that the sacrosanct laws of procedure should suffer violence. Was it not enough to satisfy an ill-starred victim that his bad luck had thrown light upon 'color' or 'absque hoc'? The judge and the lawyer on the *other* side, they at least were satisfied; while the winning client wondered and praised God — or the law, in doubt perhaps of the real agent of his happiness, though certain ''t was a famous victory.' But though men in middle life remember it, this is of the past, and only some ancient specimen of the order of special pleaders, outliving his day, now 'casts a longing, lingering look behind,' to the good old times.

The layman is right; procedure has been a prison-house for the law. Many a crippled rule of substantive law traces its appearance back sooner or later to some phase of procedure — to set forms of action, jurisdiction, 'niceties' of pleading. I need not speak

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in detail, for my associates understand, and my neighbor layman would find his thoughts — or mine — confused in the technical language necessary to the discussion; enough to allude to the fact that the common law, standing in the early and middle period of English history for all the ordinary internal affairs of men, was for centuries imprisoned within the narrow walls of some half-dozen forms of action, and that the attempt of the counsellors of Edward the First[1] to set the prisoner free was foredoomed to failure. The lawyers disarmed the forlorn hope and turned it to their own account. There were now two victims to torment with curious and cunningly devised mischief.

I have already spoken of the elaboration of an artificial system of pleading, without the business raising so much as a suspicion that the artificial might not be suited to things real; of this enough, after a word more. The artificial modes of thinking handed down for centuries could not but affect the legal profession, even after the change which swept away the substance of false ideas. Mediæval ideas, mediæval modes of reasoning, have not yet entirely let up their grip. A single illustration may be useful even to my associates. There stands in our own books of pleading and evidence, in books not yet gone out of use, a rule to the effect that words of description in an alle-

[1] St. Westminster 2, chap. 24.

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gation identify the fact to be proved; and now, ergo, according to mediæval thinking, the proof must be exact and literal; beginning with an artificial premise, you must push your conclusion to the utmost extent of artificiality — it is all a matter of reasoning, and though the reasoning is in the air, it is logic and must prevail. Now what has come to pass? Suit within thirty years, in Massachusetts, for slander; the plaintiff alleges that the words were spoken to the members of a certain corporation, which identifies the mode of publication; ergo the plaintiff must prove that the words were spoken before the corporation; the plaintiff proves that they were spoken to a person who as a matter of fact was a member of the corporation; that will not do, and the defendant leaves court rejoicing.[1]

I make but one more remark on the whole subject. The case just put is probably an expiring word. Only a remnant of the false remains — a considerable remnant it may be in some states, but still a remnant, with the tendency of that to disappear. Would our lay friend see sound doctrine fully asserting itself, he may see it working as if with a stroke at the whole fabric, in our statutes touching procedure; if he would see it working a revolution of the whole machinery in a day, let him see what was done in England in 1873, and my own associates might well look

[1] Perry *v.* Porter, 124 Mass. 338.

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into the English 'Statements of Claim' as the substitute for the whole ancient system of forms of action. The tendency is plain.

There are other subjects for criticism which are not so much in the eye of the layman as the foregoing; some of them may well be brought forward in aid of any case that may be made against the law in the particular under consideration. I shall now talk more to, or in the presence of, our lay critic than with him.

The law of torts bristles with examples in which the connection between the pursuits of men and the law seems to be lost. Trespass to property is the ever-recurring instance, and will suffice. The subject is founded upon what plainly looks like a priori doctrine, to wit, the requirement of possession. To save the subject to the common law courts, it was found necessary as early as the sixteenth century for the judges to resort to fiction. A man who had the right to take possession of a chattel was deemed to be in possession of it; and while, for reasons relating to the effect of disseisin, they could not apply the fiction in full to realty, they could say that after a man who had been ousted of his lands had regained possession, he was deemed to have been in possession all the time, and only to have suffered from the other man's daily intrusion and carrying off the emblements. And so here in effect the law was correcting itself to

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sound theory, though the immediate motive was to stay the hand of the Chancellor. The real idea still was that law should follow the pursuits of men.

But the rule in trespass — the rule of possession — was not originally an a priori rule at all. In the case of lands it was in perfect keeping with the spirit of the times, it was indeed only a reflection of them, that a man who had been disseised, and of course only a full freeman could be disseised, must regain possession before anything else. Otherwise he would lose, in the eyes of the feudal State, the position of a freeman; to be a man he must be in control of a freehold. If the person ousted was only a tenant for years, he had no possession in law at all, until statute came to his relief, even though in actual enjoyment of the land. That was feudalism in practice; that was feudalism in law. As for chattels, that was a matter which naturally followed the rule in regard to land; the first impulse of a man of spirit, that is, of a freeman, was to make war on the one who had made the invasion and recover the booty with interest. That too was feudalism in law, because it was feudalism in practice. Besides, there were remedies of a criminal nature suited to such cases. It was only then in process of time, upon the decline of feudalism and the appearance of another social order, that the rule of possession became an a priori rule, losing touch with life. Then came the new alignment of law.

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Let us turn to equity. Equity has always delighted to 'follow the law' — except when the law has gone wrong, in which case it has been content to follow its own idea of right. Equity is indeed the most faithful example the law affords of the theory we are considering, because, unlike the common law, equity could always adapt itself, and generally has adapted itself, to new situations as they have arisen without resorting to the devices which the common law has so often found necessary to rescue itself from danger. Equity has always been, what a sound system of law as a whole should be, flexible in its own nature and so adjustable to changing times and conditions. It supplies the idea and almost furnishes the model of a sound theory — almost, but not quite, for in equity too fact halts on theory.

The Chancellor, as we have already seen, once had criminal jurisdiction of an important kind; at first one of the chief grounds of the Chancellor's jurisdiction as a judge was his power to put a stop to crime, when in high places, beyond what was supposed to be within the effective reach of the common law judges. He afterward permitted that feature of his office to die out, as the ordinary judges found themselves more and more equal to the business of dealing effectively with wrongdoing by the rich and powerful. But the judges did not find it necessary to make use of the Chancellor's weapon, the injunc-

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tion; indeed, in this later stage of the law they could not have done so without authority from Parliament, which probably would have been refused if it had been asked for — the Chancellor now would have been ready to take care of any such suggestion. And the powerful, and in many cases the only effective, weapon for defeating crime fell between the two and nearly expired. Now a great and serious cry is going up against what might never have been disputed.

Constitutions and statutes are apt to contain real expressions of a priori doctrine, constitutions particularly in the framing of government. The Constitution of the United States is of course the striking example, or rather contains a supply of examples; one has but to read the debates of the Convention which framed it to see how much of that famous instrument was fashioned on a priori lines — a thing of course to some extent unavoidable in such a case. And how liable the courts are to add to the difficulty — sometimes they are driven to it — in construing constitutional or statutory provisions. The word 'commerce' in the commerce clause of the Federal Constitution is a striking, and to the guild of insurance underwriters a painful, example. Congress has power under the Constitution to regulate commerce between the states. 'Commerce' was no doubt an unfortunate word to use; but what the framers of the

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Constitution were aiming at is made plain enough in their debates and in the notorious facts of the time, if not in the final language of the Constitution itself; they were endeavoring to break down the barriers to freedom of intercourse between the states — business intercourse especially, of all kinds. They however, without due caution, used the word 'commerce' instead of 'business' or some such term, and the Supreme Court of the United States, looking at the letter alone, could accordingly say, and did say, that insurance was not commerce, and hence that the states were not prohibited from discriminating against each other in regard to that important subject.[1] And so the business of insurance was put in fetters not intended.

The recent codification of the law of negotiable instruments affords another illustration. Objection has been found to details of the statute, and for the most part, it seems to me, justly. But a more serious objection, I cannot but think, is that the compilers seem to have drafted the law step by step, without sufficient grasp of the general theory which underlies the whole of the law merchant — a defect, it must be admitted, in which they have, now and then, the good company of the courts. The codifiers of the statute in question appear never to have sufficiently considered the fact that the basis of the law was the custom

[1] Paul *v.* Virginia, 8 Wall. 168.

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of merchants and bankers, and that that should as fa as possible, that is, always if possible, be considered to have been the guide of the courts in expounding the subject — a guide sometimes lost indeed, sometimes not looked for, but after all the general guide. It should have been clear that the departure of the judges, whenever they do appear to have lost sight of the guide, was due, not to any real purpose to refuse a place to custom, but to the natural tendency to apply reasoning, that is, common law reasoning, or logic, everywhere.

Indeed, the codifiers of the statute seem not to have taken to heart the plain intimation of theory given in one of the early sections of the act itself — the section in which it is in terms provided that where the statute fails the law merchant shall govern. Losing sight of this fact, or not giving sufficient importance to it, the codifiers could incorporate such a piece of a priori law into this important statute as a whole article on acceptance of bills for honor. It will perhaps be said that though our merchants and bankers have never adopted the English custom of acceptance of that sort, they may do so, and it is desirable that they should. That is the most that could possibly be said; and that on its face is unsound — it is the ground always taken for a priori law. It is not for one set of men to say what another set shall do. If on the other hand it be said that no

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one is obliged to adopt the practice, then the answer is that the statute is an idle word. The law relating to negotiable instruments, of all laws, should follow business, and not seek to direct it.

The objection here raised is not to codification itself; founded on sound theory, to wit, that it must keep close to life and not expect to last forever, codification of some subjects may be useful enough to justify it.

The result of this prolonged examination of grounds for complaint is that we have much seeming and not a little real departure from sound theory; but even the latter seldom if ever of purpose. Generally it has arisen from following logic instead of regarding the centre of gravity, sometimes, as in the loss of the injunction in matters of crime, because for a long period an arm of the law has found no occasion for use. It can safely be affirmed that the law has never for any considerable period, if at all, professed to deny that it should be obedient to the idea that men should be free to do what is, according to the time, deemed reasonable. As a matter of fact however every ancient — or modern — rule of law which has been kept alive after the conditions under which it was laid down have essentially disappeared, has become from the time of the change an a priori rule, and so out of touch with sound ideas. The rule may still be work-

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able; we have many such cases, but we should at best tolerate rules of the kind only till the proper time comes to bury them decently or turn them over to the historian. Of this however later on.

How to get rid of such rules, if at all, may not be easily seen. In the case of some of them there is but a survival of what is now nothing more than legal cant, and the judges have but to give up the cant. Why should any judge longer say that possession is necessary to a suit for trespass or conversion, and then take the truth out of his own mouth by saying that wherever it is necessary, a possession in law, which is no possession at all, will be considered to exist? The way is now quite clear for any judge with but a small amount of courage to say that if the plaintiff shows a right and an infringement thereof he shall recover. This would despatch business, by cutting off debate and delay over irrelevant questions; and what is much more, such things would tend to cause the people to return to that respect for the law which they have long and not unnaturally been losing. They would then understand the law. Is it not time to show the people, upon suitable occasions, that their own laws are not secrets beyond the power of all but experts to understand? Of course there will be much which only experts can fully comprehend, just as — for the very same reason that — there is much in the daily pursuits of men which only men

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trained to the particular business can comprehend; but that the people should not be able to understand a rule of law because of some ancient and now useless formula — jargon to the uninitiated — should be as much a reproach to those who keep up the farce as it is a danger to the State.

I have thus far been talking with or to laymen, the people; not — and I wish to say this in the plainest words — not because it would sound commonplace to lawyers; I have been talking with and to laymen because of what my first words towards them gave a hint. We want the public with us in this business of promoting sound doctrine; nay, we must lean on the public if we would succeed, I will not say in the matter of teaching law to students — my remarks would be senseless if they did not mean something quite different from that. We must lean on the public if we would hope to succeed in the higher duty of bringing the law into such perfect touch with men and their pursuits that all will be bound to say 'We will wait.' I would hope to succeed still better than that, by enlisting the public at the outset in the attempt to bring the law, in fact as well as in theory, into practical conformity with the social conditions of the day. Let us call in business men to help us in our teaching in the Law Schools; let us ask them to speak to the students of the relation between business and

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law — of the difficulties created by constitutions and statutes and judicial decisions, and of the proper remedy. Let us ask underwriters, for instance, to speak of state legislation on matters of insurance, of federal decisions and federal regulation of the subject. Let us ask railroad men to speak of the relation of railway transportation to law. So doing, may we not have ground to expect encouragement from the public? Let us make it clear that we are teaching young men a practical system of law, the law as it is manifested in the actual course of administering justice in our day — the law as it is, unflinchingly, with all its defects — and then in addition that we are endeavoring to impress on all who will listen, in the Law School and beyond, the importance, as a matter of safety, of working to better ends than those which the law has yet reached — may we not, with such aims, expect encouragement as well as good-will from the public?

I hope now that I have made it clear why I have been taking laymen into counsel and confidence in looking into some of their every-day relations to the law and examining their grounds of complaint in regard to it. I hope I have made it clear to laymen that the prevalent idea among them, that the law has been mainly spun out of the heads of judges and legislators, is unfounded. If now, from this point on, I have to address myself more to the expert and

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the student, it will not be because I fear to make disclosure; it will be because I must necessarily appeal mainly to those more directly concerned with the administration or study of the law. Still I shall hope that the substance of what I may have to say will not be lost upon any one who cares to hear me.

No argument or setting out of illustrations is needed to convince lawyers of the tendency of the law — its general tendency to follow the pursuits of men. To the lawyer that is a perfectly obvious fact; every day's experience with him shows it; he knows indeed that no system of law could stand which denied or was even indifferent to the idea. The only person who needs to be convinced on that point is the dissatisfied layman. But now I want to say, as the very point of my subject, that it is not enough that the general tendency of the law is right. You may put your ship about to port and set your sails to the favoring winds, you may set your helm right, but unless the needle points true and you are vigilant and faithful to your single aim, you will at best only drift, or *tend*, towards it.

Tendency then should give way to definiteness of aim, and steady, persistent endeavor. As was said at first, by way of a keynote to the whole subject, the law should become what it professes and tends to be;

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it should be in harmony everywhere with the social equilibrium. When this stage is fully reached, the law will be serving its purpose towards accomplishing the ends of existence.

Legal education should, I think, be committed to this idea. The Law Schools, and the bar associations as well, by committing themselves to this definite idea, may powerfully help on the consummation; directly and indirectly they have the power to bring it to pass, perhaps within a single generation.

The definite aim should be centred in our day. By the reasonable purposes of men is meant the purposes of men of to-day; the law should be an ever-living fact, a fact of the life of the present day. It should be for us who now live; to-morrow it will perchance, under change of conditions, be another thing — it will be for our successors. The law should be suited to him who needs its protection, whenever he may live, in accordance with times and the pursuits of men. When this ideal is reached, the year 1800 will be no more to the people, so far as the law is concerned, than the year 1700 or 1600 or 1300. All of that, so far as it fails to shed light upon our own path, will be turned over to the historian, or used for another purpose than teaching our law. The historian of the law of yesterday will have his place, as has the historian of other things; he will have his place on the bench, for the bench will

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always need men of broad mind and learning; but in proportion as the ideal is reached, the judges should find less and less need of seeking authority in the Year Books or in Coke or in the worthies of much later times for their decisions. The life of another and different age will not bind our successors in the day of the full consummation. If we govern ourselves to-day by laws laid down yesterday, it is or should be because those laws are suited to us; they are our own laws, not a priori laws made for us by another set of men.

Are we then, in accordance with such a school of ideas, to overrule the past, with all its accumulations? Clearly not; we have only to leave it alone where it fails to serve us. The past served its purpose in its day; why should it have a posthumous life, to trouble men living under other conditions? After the period of the reasonable life of a decision, let the decision, as a binding authority, die. The latest of the Year Books died long ago; the decisions temp. Talbot, temp. Hardwick, Burrows' Reports — are these ever cited nowadays by the courts except for history? The Revised Reports of Sir Frederick Pollock, intended to cover all the living judicial law of England, begin but just before the nineteenth century. Statutes die — where are the judges who have had occasion, except for history, to cite a tithe of the statutes passed before the same nineteenth century?

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Who would venture to cite any of our colonial laws, even down to the Revolution, as living law? The laws peculiar to our own day will go, because they ought to go, the same way; the only difference, when the new order of things comes fully into operation, being that their day in ordinary cases will be shortened. Let them live a reasonable time, that is, so long as they serve the social order — then let them die. It will be no cause for fear to see 'authority' of the kind relaxing its hold upon the administration of justice.[1]

All this is far from suggesting that under the operation of a scientific method the law hereafter will be substantially different from what it is now. No one probably, under peaceable conditions of the State, will have occasion or desire to tear down the structure already erected; its interior walls generally are likely to remain as they are now. They will remain so long as they are adapted to the needs of society; more could not be expected — the dominant force in society should, as far as possible, have its will enforced. The pinch of the past is mainly due to the building up, by logic, of exterior walls; in building outer walls, limitations are often set to the adoption of reasonable pursuits. Even the interior walls may not in every particular be secure. Larceny

[1] Would there be serious ground of regret if at last we should come to German and French ideas of precedent?

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will always be a legal wrong — probably always a punishable wrong; instinct decrees it, and the law must follow. Fraud and damage will always call for redress in compensation; instinct decrees, and the law follows. Et sic de aliis. But instinct itself is subject to the legal limitation and control. Larceny is likely to remain a crime throughout the future, but the ingredients of larceny and the conditions required for it as a crime are matters of judgment, and may change with changes in men's ideas of what should be necessary for the purpose. Fraud and damage call for compensation, but men may differ in the future, as they have differed in the past and now differ, in regard to the ingredients of fraud. Instinct may be counted upon; but reason, and especially reasoning, will depend upon times and men. And so it should be; the past, as mere authority, should not lay a heavy hand upon the needs of the future. But after all, the interior structure of the law is likely to remain substantially as it is to-day, in the absence of destructive upheaval. No working of the dominant spirit is likely to tear out the inner walls of the law.

Legal history in any event will have a necessary place in the study and teaching of present law, so long as history is needed to inform men of the meaning of any part of the law under which they live. Illustrations appear in the first part of this lecture. The teaching of legal history, to that end, cannot

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be a negligible factor in the work of legal instruction in our day — in the day of the youngest here; but the teaching of legal history to that end — as part of a course in the law as actually administered in the courts of justice to-day — should stop where it ceases to throw light on what of the law would otherwise be unmeaning or obscure. To teach legal history as such, to such an end, to teach the stream simply because it has flowed down to us, would, it seems to me, be not merely waste — it would be positively misleading — it would be putting the chase on the wrong scent. A clear discrimination should be made between what influences the declaration of law and what may be useful for other purposes. As a field related to present law, as an outlook, the study of legal history as such — the whole continuous stream of it — will always be informing; to him who has the historic sense, it will be full of interest, and for broadening of the mind it will be of real value. On that last footing it should always have a place in our Law Schools; but this is anticipating the subject of the latter part of this lecture.

If then the law is to be, and to be kept, in touch with life as it is, if it is to be the servant of the dominant force in the State, it is plain that those who are responsible for its behavior should themselves be well informed touching life as it is and the affairs of the time. This is essential if the law is to be

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placed on a safe, sufficient basis. And so of the teaching of law; that should proceed, not upon a blind adherence to and statement of the effect of authority; teaching should proceed from a competent knowledge of life, with a view to training men to take the right position in regard to the true function of law. In a word, a scientific school of law should make it one of its paramount objects to see that sufficient study is made of the sources whence the law is to be declared — the sources of whatever kind; not merely the precedents, not merely the history of doctrine founded upon peculiar conditions of the past, which, notwithstanding all changes, still more or less prevails, but the direct and immediate sub-legal sources — business and pursuits generally, and the other less tangible influences which go to make up the sum total — the political, economic, psychological, and personal influences. Influences such as these have always played their several parts, and always will do so, in the declaration of law.

That the law should be brought into close touch with life — that it should keep at the centre of the social equilibrium — and that those who are to be chiefly responsible for sound doctrine should, in our schools of law, be trained accordingly — that is not all of what is meant by the title to this lecture. In

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an unprinted essay I have endeavored to show that all special education should be considered incomplete — that after teaching the student the tools of his trade, he should be taken beyond his particular field into fields related to it, to the end of broadening his mind. I am committed by a firm conviction, based, I hope, on sufficient observation, to the belief that this is especially needful in legal education — a belief shared, I am persuaded, by a larger number of the leaders in the profession of law than is commonly supposed.

It is not enough to prepare young men for bar examinations; it is not enough to make lawyers in the ordinary sense of making or helping to make men proficient in the rules of law. That, taken alone, is special and hence narrow education, however wide the field of law. How special and narrow it is the world judges, too sharply perhaps, but still with much reason. The popular prejudice against lawyers, that they are narrow men, capable only of taking the 'lawyer's view,' could not arise out of nothing. The lawyer in public life — the place for which he should be peculiarly fitted — is a standing illustration with the world, and too often a real disappointment. Thus, in Congress lawyers directly from practice or the bench are apt to fall short of leadership, however successful they may be on the lower level of debates on law or of giving technical aid in the draft-

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ing of bills and similar business. Commanding influence there comes as a rule only to men of broad mind and training; lawyers of that description come to leadership in public life and everywhere.

The difficulty with the rest is, not their legal education — that should be a powerful help — it is that they have not been taken out of the rut and round of the practice of law. There the whole brunt of energy is expended on particular cases, on details; of the wider outlook upon even the whole body of the law, how much of that is there, in the life of the average lawyer, in the practice of the legal profession? The difficulty began and was hardened in the training for the bar. Had a wider education informed the student's special knowledge, then or afterwards — if then, it would have been likely to continue afterwards — the result must have been different, unless nature or inclination committed him to narrow ways.

We must add to our teaching of the tools of the trade an outlook upon, and as far as possible a knowledge of, the world that lies just beyond the field of law. The specialist is a dangerous man, even within his own specialty, if he has not the broader knowledge of acquaintance with fields adjacent. Men are moreover going more and more from the Law School into the world instead of into the practice of law; and that is a thing much to be encouraged. The

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fact emphasizes the duty of the schools. Specialization is but a first step in education — a necessary step indeed, but only a first step; scientific education calls for the broadening of the mind. 'This winter,' wrote from Washington, recently, a distinguished friend of mine, who has made the most of unrivalled opportunities for observing the drift of legal affairs, and is entitled to speak on the subject, — 'this winter here has convinced me that the function of the Law School must be broadened,' in the way indicated in both the earlier and the present part of this lecture, 'if it is to perform its office.'

What the related fields are need not much detain us. I have spoken of business and of history. The former should at least include transportation, interstate commerce, insurance, and banking, where these subjects converge on the law. To these there should be added municipal government, international law, consular affairs, the relation of colonies and dependencies to the home government, and federal responsibility for countries under protection against foreign aggression.

It will now be proper to present a summary of what, according to the views expressed in this lecture, should be taught in Law Schools willing to do their part in promoting a scientific legal education. The schools should teach:

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First, the law as we have it, that is to say as it is actually administered in our courts of justice;

Secondly, the nature of the defects discovered in the connection between the law as it is and the theory of rights, together with the duty of earnest, persistent endeavor to bring about a full conformity of the law to the actual affairs of life;

Thirdly, a substantial acquaintance with subjects related to the law, including the sources of the same, with a view to broadening the student's intelligence.

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LECTURE V

LAW AS AN APPLIED SCIENCE

WE meet here to-day because the Dean of this School has certain definite ideas as to the nature of law and the requirements of legal education. These ideas he and his associates in the Faculty are now attempting to work out here. Knowing my sympathy with his views, the Dean has asked me, as an alumnus of the School, to speak to you on law as an applied science.

I am to discuss law as an applied science; therefore I begin with the man who applies the science — the lawyer, and with the lawyer at work.

First then let us consider the nature of work in general. Every act involves an adjustment of conduct with the intention of reaching a desired end. In this adjustment the psychical phenomena are, first, a conception of the end to be attained; second, knowledge of the means to the attainment of that end; and third, the exercise of volition to use these means. Thus, in shooting an arrow at a target, the desired end is to hit the bull's-eye, and one must therefore know where the target is located and at what distance; must then estimate the direction and force of the wind, the character of the bow and arrow and one's

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own personal equation; and by combining these different factors determine how the arrow should be aimed and the bow be drawn. Finally, one must draw the bow, aim and discharge the arrow. Now there is no certainty of hitting the bull's-eye, even for the most expert archer; and so it is with all human action. There is always a risk that one may have an erroneous view as to the end to be attained, may be ignorant as to the necessary means of attaining it, or may be unable by volition to make use of such means. All work therefore, all action, involves the taking of risks. The very attempt to accomplish anything involves the risk of total or partial failure. The only way of avoiding this risk is by doing nothing. To him who says, 'I fain would climb, but that I fear to fall,' the world replies, 'If thy heart fail thee, do not climb at all.'

It is the inherent risk in doing things which makes the most important practical difference between law when looked upon as an applied science and when looked upon as a pure or speculative science. There is a risk involved in making or passing upon an abstract of title; but there is no risk involved in the most profound contemplation of the rule in Shelley's Case. There is a risk involved in trying a law-suit; there is no risk involved in reading a treatise on evidence. Success in the law therefore, as in any other profession, does not mean the literal following of the

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counsels of perfection of the critic. It does not mean the avoidance of all mistakes, of all failures, but only the making of as few mistakes and of as few failures as the conditions under which the work that is to be done will permit.

As I have said, I am to speak of the lawyer at work. Now the first thing you notice about the lawyer at work is that he is doing something for somebody, that somebody being the client. Obviously therefore the first thing for the lawyer to determine is what his client wants. But, you reply, the client, tells you what he wants. Unfortunately this is not always true. A client may say that he wishes something when his wish is based upon some erroneous supposition as to the law or the facts in his case. You cannot therefore tell what he really wants until you are sure that he understands what the real effect will be of doing that which he thinks he wants done. You must be sure therefore that he fully understands the situation before you act upon his request. Or again your client may to-day desire to take some action for which you know he will be sorry to-morrow, and if you comply without hesitation with his wish of to-day, you may find to-morrow that he will reproach you for having acted so hastily. Then too your client may have not one mind but many minds, as where you represent a body of creditors or taxpayers and have to try to satisfy all of them, which is

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by no means an easy thing to do. The importance of ascertaining your client's real wish therefore is not to be ignored.

The end then which the lawyer has in view is the satisfaction of his client's wishes, in so far as those wishes can be satisfied without conduct infringing the lawyer's code of ethics. I am aware that this view is open to criticism. It will be urged by some that the end which the lawyer should have in view is to uphold moral justice and maintain truth. This criticism, although apparently sound, really involves a confusion of thought as to the respective extent of general and special codes of ethics. It is the duty of every man to uphold moral justice and maintain truth; but terms have in every profession a certain technical or conventional meaning. The very undertaking of any profession, of any active life, involves the necessity of accepting certain postulates without discussion. The soldier has to assume that the command of his superior officer is just; the clergyman who impugns the truth of the creed which he professes fares but ill in the pulpit; the lawyer in criminal practice who defends only the innocent will have but few clients; and the advocate who insists on being satisfied as to the moral justice of a quarrel between two litigants before accepting a retainer will hardly have sufficient time for the investigation of the matter before his client requires the services of other counsel. The

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wheat and tares must grow together until the harvest; the lawyer's bills, like the rain, must fall alike on the just and the unjust. The criminal is entitled to the services of a physician to preserve his health, although he is under sentence of death; and he is equally entitled to the services of a lawyer to preserve his liberty until, by a fair trial in accordance with the law of the land, that liberty is taken away. A miserable profligate is entitled to the services of counsel to assist him in depriving the widows and the fatherless of a charitable bequest made by his father without strict conformity to legal technicalities; just as he is entitled to the services of a physician to enable him to build up the body which his vices have broken down. In short, the ethical question for the lawyer, as a lawyer, is not the moral justice of his client's cause, but the conformity of his own conduct to the accepted standard of legal ethics. It is, of course, open to every lawyer to choose what kind of cases he will undertake; and it is undoubtedly true that the temptations to misconduct in certain kinds of work are greater than in others, but the selection of one's clients with reference to their moral ideals is not as yet practicable.

If the client's wishes are immoral, the lawyer of course must refuse to carry them out. Strictly speaking, perhaps, the same rule should apply if the client's wishes are, even technically, illegal; but the actual

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practice of the bar requires caution in formulating the latter statement. Thus in many states the formation of combinations among business men for the purpose of keeping up prices is illegal. Such combinations are innumerable, and are not often entered into without the advice of counsel. So far as my knowledge goes however no lawyer has ever yet been disbarred for participating in or arranging any combination in restraint of trade. It is true that the Supreme Court of Illinois[1] has lately intimated that the formation of so-called 'trusts' is not part of the legitimate practice of the law; and doubtless when business men cease to combine to control prices and production in their particular business, lawyers will cease to aid them in that practice, and clergymen will cease to explain how the profits arising from a business in which competition has been restrained can properly be devoted to pious uses. It is often charged that lawyers in such cases assist their clients to evade the law; but this charge involves a fallacy. The end which the client seeks is not immoral, or illegal; it is merely to obtain a higher price for his property or for his services. That end may be obtained by legal or by illegal means. What is legal and what is illegal in such cases is often a question of great technical difficulty, and all that the lawyer does is, as an ad-

[1] Harding *v.* American Glucose Co. 182 Ill. 551, 64 L R. A. 738.

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ministrator, to devise, if he can, a legal method of accomplishing the desired end. If he is fortunate, his method is approved by the courts; but if not, he must devise some new method by which his client can carry on business in accordance with both municipal and economic law.

Subject to certain ethical limitations then, the object of the lawyer is to satisfy the wishes of his client. Now what are the things which clients want and cannot do for themselves, or cannot do as well for themselves as lawyers trained in the administration of affairs relating to law can do for them? First, the client needs advice; he is uncertain how to act in a given difficulty, and requires the aid of the expert counsellor to enable him to act wisely. Second, the client wishes some legal instrument prepared — a deed, a contract, or a will. This instrument is desired for the purpose of accomplishing a certain legal result. The desired result is stated by the client, and the lawyer interprets his client's will into the proper legal form. Third, the client has an important business matter on hand, which involves harmonizing the opinions and desires of different people so that they may come to some agreement. Here he wishes a trained negotiator to assist him not merely by advice, but by active diplomacy, in securing as many concessions from the other parties as possible, while giving as few as possible in return. Fourth, the

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client has a law-suit, and must have the assistance of a lawyer to present his case to the Court by proper pleadings, to procure the necessary evidence, and to try the case as an advocate. The functions of the lawyer then are those of counsellor, interpreter, negotiator or commercial diplomat, pleader, investigator of evidence, and advocate; and the question before us therefore is, how are we best to fulfil those different functions, which taken together constitute legal administration?

The first answer to this question will doubtless be, 'By studying law, of course.' Exactly; but what do you mean by studying law, and how will that enable you to become sound legal administrators — to give wise advice, to draw flawless documents, to engage in the diplomacy of business, or to sway the minds of the jury in favor of your client without requiring the Court to set aside the verdict? Have you ever fully considered these questions as to the relation of your legal studies to the practice of your profession? In the first place, what do you learn when you study law? That of course depends entirely on what method of instruction is pursued. You may start out with a definition of law which you commit to memory, followed by a definition of dower, six or eight definitions of contract, and fifteen or twenty definitions of partnership. It is true that when you come to partnership, so eminent an author-

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ity as Lord Lindley would rather give you a dozen definitions of partnership by other people than frame one of his own; and yet the memorizing of definitions is undoubtedly one method of learning law. Carried further, this method involves the acquisition not only of definitions, but of rules; and the sum of all the definitions and of all the rules is said to constitute the law.

It is obvious however that all these definitions and all these rules must have some origin. Philosophers and jurists at one time reasoned as if these rules and definitions had always existed and formed part of some mysterious code known as the law of nature. The provisions of this law of nature were to be ascertained by the enlightened reason of the philosopher.

One of the important dogmas of this school of thought was the theory of a social contract by which men originally in a state of nature agreed that they would live in a state of civilized society subject to the rules of this law of nature. The eighteenth century philosopher assumed not only the existence of this law of nature, but also his own clear and accurate knowledge of the principles of this unwritten code, and his inerrancy in deducing from such principles every rule of law necessary for the guidance of man in the ordinary affairs of life. As Blackstone says, 'No human laws

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are of any validity if contrary to this, and such of them as are valid, derive all their force and all their authority, mediately or immediately, from this original.' But while Blackstone accepts the law of nature, he says that he cannot 'believe with some theoretical writers that there ever was a time when there was no such thing as society, either natural or civil; and that from the impulse of reason and through the sense of their wants and weaknesses individuals met together in a large plain, entered into an original contract and chose the tallest man present to be their governor.' The law of nature and the social contract, as foundations for legal reasoning, have practically disappeared; but the method of reasoning accompanying them still retains a hold upon the human mind, and there are still people who believe that there are certain fundamental principles which can be so stated that all other rules of law become a mere matter of logical deduction from these premises. This school of thought however has been superseded in theory, but not entirely in practice, by the historical school, which emphasizes the importance of knowing the historical development of existing rules of law. Thus, instead of beginning the study of law by memorizing definitions, you may begin by endeavoring to grasp the meaning of some decision in the Year Books translated from its original black letter to meet the needs of your ignorance. You may follow this by ascer-

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taining, non sine labore, that the rule laid down in the Year Books was modified by Lord Hardwick, and reversed by Lord Eldon, but would nevertheless be the law in Massachusetts to-day had it not been for some colonial ordinance of 1641, or for the enthusiasm of some judge's private secretary in collating the opposing authorities. This too has its uses, and is one method of learning law. The controversies as to the best method of learning law have been spirited and long continued. Into those controversies I shall not enter. I dispute neither the utility of dictionary definitions and text-book rules, nor the importance of critical historical study of the development of a rule through a long series of cases. From my own experience and practice I may say without hesitation, that I know too few rules and definitions, and too little about the history of those rules which I do know.

Let us assume that you have learned all the rules and definitions and know the history of all the decisions of the courts. Are you then a lawyer? The Faculty may say yes; the State may say yes; the Bar Association may say yes; but what will the world say — the world of clients, that is the real world in which the lawyer lives and moves and has his being? The world *may* say yes, but the world's assent is always given grudgingly and under compulsion. Must the world say, 'This man is a

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lawyer'? No, not unless you can do the work of a lawyer. Your legal learning may entitle you to the title of jurist, but that is a different thing. A man may be both a lawyer and a jurist, but a jurist is not necessarily a lawyer, nor a lawyer necessarily a jurist. Both must possess an acquaintance with what we call the law, but that is all. The work of the jurist is the study, analysis, and arrangement of the law — work which can be done wholly in the seclusion of the library. The work of the lawyer is the satisfaction of the wishes of particular human beings for legal assistance — work which requires dealing to some extent therefore with people in the office, in the court room, or in the market-place. The relative importance of the lawyer and the jurist is not material to this discussion.

Any highly civilized society requires both lawyers and jurists, both philosophers and men of affairs. As a mere matter of fact, there is a greater demand for men of affairs than for philosophers, for lawyers than for jurists; but the number of persons which the interests of society require should engage in a particular occupation, has nothing to do with the question of the importance of the different kinds of work done by those persons. It is important however to note the fundamental difference between the work of the lawyer and that of the jurist.

We have heard much of the progress of legal

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education in the last generation. The quantity of systematic instruction has greatly increased, and the quality of the instruction has greatly improved. In thirty years we have seen the transformation of the entire theory of legal education. In place of the old-time apprenticeship method of training, by which the student followed in the footsteps of the practitioner with whom he read law, we have to-day systematic legal education in Law Schools which are regular departments of our universities, and instruction given along approved lines. American universities to-day are attempting a task of which Oxford and Cambridge do not dream. We are trying to turn out well-trained lawyers, while Oxford is satisfied to graduate a man with the degree of Bachelor, not of Common or English, but of Civil or Roman Law, leaving him to acquire his professional training in the Inns of Court. I say that we are attempting to turn out well-trained lawyers. Unfortunately however in the reaction against the old haphazard unscientific training by apprenticeship, there is danger that our legal education may become too academic in character. It is universally agreed that knowledge is power, but the saying is ambiguous. Take the case of the movement of a billiard ball. There are some twenty-eight unknown quantities, I believe, involved in the mathematical equation expressing the movement of that ball. Knowledge is power, but knowl-

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edge of the mathematical formulæ determining the movement of that billiard ball is a different thing from the knowledge of the game of billiards. Only that knowledge is real power in any given case which tends to diminish the difficulty of accomplishing the result desired in that case. If the result desired is the passing of an examination in mathematics, knowledge of certain equations is power. If on the other hand the result desired is the winning of the game of billiards, knowledge of equations is not power at all.

In all cases therefore there is a distinction between knowing and knowing how; and knowledge is power only in case it is that sort of knowledge which is necessarily included in knowing how. How far does this distinction hold good in the practice of law? Is there any knowledge whatever which gives no additional power to the practising lawyer? The answer to this question is not a simple one. Practically speaking, to a lawyer in general practice there is no knowledge which may not at some time prove of value. At a given time however and in a given case there may be a great deal of knowledge in a lawyer's mind which adds nothing to his power in that particular case, simply because that knowledge has no relation to the case in hand. Thus, for example, the most profound knowledge of contingent remainders will not constitute power to try a negligence case or to organize a corporation.

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Nay more, it is entirely possible that certain knowledge may be a positive drawback to success in a particular case. This, you say, is impossible. It would be impossible but for the character of the human mind. Take this case however. Here are two facts, A and B. Now you may know A and be ignorant of B; or you may know both A and B, but for some reason A may to your mind be so important as to obscure your appreciation of B. Suppose then A and B are facts which operate as opposing forces, and that B represents the stronger force and is therefore the more important fact. If you are ignorant of A, A has no influence on your conduct. If you know both A and B and have them both clearly in your mind at the time, B is the controlling fact; but if you know A and do not know B or do not realize the importance of B, your knowledge of A will inevitably lead you in the wrong direction, farther away from the true course than you would go were both A and B unknown to you. This is not exactly the case of knowledge of a half truth. Your knowledge of A may be complete, and your knowledge of B may be complete; what is lacking here is your knowledge, not of A and B as separate facts, but of the relative importance of A and B when both are factors entering into the same problem. In the practice of law the matter works itself out in this way: A is a technical rule of law the logical applica-

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tion of which must lead in your particular case to a certain result. B is the fact that that particular result is one which the Court where the case is pending will seek if possible to avoid, on grounds of public policy, so called, or of political or economic or ethical or religious or personal bias. The more certain and definite your knowledge of the technical principle, the greater your danger of ignoring the importance of what that particular court regards as substantial justice, unless your training has given you some knowledge of the relative importance of the various forces, logical, psychological, and other, which produce judicial decisions. Take another example: A is your client's narrative of the facts in the case. B is the possibility that your client may have a bad memory or a vivid imagination, or may fail to mention to you certain important facts because he is ignorant of their importance. If you give an opinion based on the client's simple narrative without cross-examination of the client and careful investigation of the facts, you may find that your advice has been absolutely mistaken simply because your knowledge of your client's statements was not adequately supplemented by your knowledge of the imperfect accuracy with which clients' statements are often made.

It has been said that all the law is to be found in books. If this statement means that all the knowl-

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edge which a lawyer needs to enable him to do his work properly is to be found in books, it is extremely misleading. All the law in the books may at some time or another be useful to the lawyer in general practice; but if he knows nothing outside of his law books, he is not qualified for the general practice of the law. We have seen that the first function of the lawyer is to give advice. Now in giving advice to a client, one has to consider not simply certain general rules of law, but the application of those rules to the client's particular circumstances. Suppose that a client comes to you with a certain statement of facts upon which he wishes your advice. You examine his statement of facts, and upon that statement you advise him that he has a claim against B for $100. You therefore advise him to sue B for $100. Your client A accordingly employs you to bring suit against B for $100. B proves to be a person of litigious disposition and refuses to pay when sued. You bring the case to trial, and B makes a hard fight and through some mistake of the Court obtains judgment in his favor. You then appeal the case to the Supreme Court, which sends the case back for a new trial. On the second trial you obtain judgment for A, and this time B appeals to the Supreme Court. The judgment in A's favor is affirmed, and you collect the $100 and costs for A. You thereupon send A a bill for your services, giving him credit for the

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amount collected. A is disgusted, disputes your bill, insists on a reduction, and the next time he has a dispute with B he goes to another lawyer who promptly settles the case. Now your advice in this case has been, from one point of view, entirely sound. You told A he had a right to collect $100 from B, and you were right; but when you advised A to bring suit for this $100, you left out of account some important factors which are not to be found in the books; you were not a sound administrator. Thus, in the case just put, you are bound to consider whether A is a man or a woman; whether he is rich or poor; whether B is fond of litigation or has a lawyer who is fond of litigation; whether A's object is simply to get what money he can, or is to enforce his legal rights without regard to the question of expense; what the character of the case is; whether it is simple or complicated; whether an appeal is likely; whether more than one trial may be required; and how much each step in the proceeding will probably cost. In short, in a given case, assuming that having examined all the law in the books you feel absolutely certain what the decision will be on the given state of facts, which happens less frequently than you might suppose; and assuming that you can prove all the facts which your client states, which also happens less frequently than you might suppose, you still have

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certain other factors in the problem before you which require careful consideration. Now, as a matter of fact, you often do not know exactly what rule of law the court will lay down on a certain point, and you do not know exactly what facts you can prove, and you do not know exactly what the cost of litigation will be, or what accidents may affect the course of that litigation, such as the death of parties or witnesses, or the destruction of books or documents. In advising your client therefore your opinion is based upon probabilities, not upon certainties. In giving advice therefore you take the risk of making a mistake, just as in following your advice your client takes the risk of making a mistake. As I have said at the beginning of this lecture, we take risks in doing anything, but we all wish to minimize those risks. To my mind the risks in the practice of law are to be minimized not by disregarding the importance of the law which is to be found in books, but by adding to a knowledge of that law a knowledge of the facts and conditions under which human life to-day is carried on. As the chief function of the lawyer to-day is in connection with the business of the community, he ought to understand the conditions under which that business is transacted, and these conditions vary from generation to generation and almost from year to year. It is perhaps not generally appreciated how far not only the particular rules of law, but the

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broader underlying principles on which those rules are based, vary from age to age. The law that is found in books is the record of the legal results which lawyers and litigants through judicial decisions and through statutes, as expression of the dominant force in society, have accomplished. In the rules and definitions of text-books and in the opinions of courts, these results are summed up with more or less accuracy in a convenient form. For practical convenience you need the general summary of these results which is contained in a rule, whether that rule be stated in a text-book or in a lecture or in a judicial opinion. For the purpose of testing the accuracy of the rule so laid down, and of determining the extent of its application, you must be able to examine and compare the facts upon which this rule is based, the most important of which facts are the actual decisions of the courts. If the system of law in a particular jurisdiction could be wound up at a given moment, as by the annihilation of the people and territory within that jurisdiction, the law in the books would become in truth the law, and that law could then be treated satisfactorily as a pure science. Such a system of law would be a matter of scholastic interest, but in spite of its theoretical permanency and completeness, it would be of no practical importance. The law of primary importance for the lawyer is always the law of the future — that is to say,

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the legal result which will come to pass with reference to his own particular case. To him therefore the value of every past legal result depends solely upon the probable influence of that result upon the future result of his own case. It will at once appear therefore that of the infinite number of past legal results — that is to say, the past statutes or decisions — a large portion will be of relatively slight practical importance. Thus, for example, the law of copyholds and the law of tithes, although just as excellent in their way as the law of corporations, are not of practical importance to us. In learning the law of the books therefore it is necessary to select the parts of that law which have the most direct bearing upon the future practical work of those who study that law. This selection must determine the character of the Law School curriculum. To this law of the books however, no matter how well taught and how judiciously selected, the practising lawyer must add a knowledge of those factors other than the legal results of the past which enter into the problems which come before him. Among these factors may be mentioned human nature with its great variety of emotions, modern business methods, and social and political conditions. Thus in a particular case it may be useful to you to know that a common tendency of human nature is, when excited, to display an enthusiasm for litigation, which may lead you into

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difficulties if you fail to bear in mind another common tendency of human nature, which is to object to paying the expense of litigation. Again, under the conditions of modern business, business men generally prefer to settle disputes by compromises than by law-suits, and it may therefore be they will reward you more for your skill as a negotiator in settling a dispute than for your skill as an advocate in winning the law-suit with reference to that dispute. Again, you will find no rule of law laid down in the books that upon exactly the same evidence in a negligence case against a corporation a jury is more likely to find for the plaintiff than a judge, and yet this is almost elementary for the practitioner; so much so that whenever a Connecticut plaintiff is able to sue a Connecticut railroad company in Massachusetts on account of an accident, he always seeks the Massachusetts courts, because he is not able to get a jury trial in Connecticut in such cases. As for constitutional and economic questions, no lawyer can neglect to inquire as to the political or economic school of thought to which the members of the Court which is to pass upon those questions belong, for in such cases the decision is frequently an expression of the particular political or economic views of the judges deciding the case.

If then there is such a thing to be found in the books as a pure science, there is also an applied

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science of law which involves a consideration of many matters of which the pure science does not treat. These suggestions in regard to the character of that applied science have been made because it is believed in this Law School that law should be taught as an applied science.

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LECTURE VI

AN OBJECT-LESSON IN EXTENSION: RATE-MAKING[1]

IN entering upon a discussion of any complex question, we get a clearer comprehension of it if we first disentangle the abstract and permanent principles involved in it from the many transient aspects which it assumes as a concrete whole; and an intelligent comprehension of rate-making is furthered by a consideration of the theory apart from the practice. This is all the more important because rate-making has become the storm-centre of the railroad problem, the point of convergence of all arguments about state control of railroad corporations, and the point of divergence of all opinions with reference to it. The expounders of these arguments and opinions enter the forum from opposite sides; the advocates of state

[1] Copyright, 1905, by The Macmillan Company. Reprinted here by the courtesy of that house. This lecture constitutes Chapter VII of Restrictive Railway Legislation, by Henry S. Haines, published by The Macmillan Company; the whole book consisting of a course of lectures delivered in the Boston University Law School in the spring of 1905. The lecture illustrates the idea of extension in legal education as undertaken in this school.

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intervention from a study of the subject in the abstract, the advocates of the let-alone policy from the field of experience. It is a lining up of theory against practice, and, to begin with the principles, we will first take up the hypotheses of the theoretical rate-makers.

It is assumed on both sides that a rate should be just and reasonable, and the first problem to be solved is what constitutes a just and reasonable rate. We may consider that by just rates is meant that there shall be no unjust discrimination, but what is the idea conveyed in speaking of a reasonable rate per se? It is maintained that transportation charges shall only result in reasonable returns upon the investment, but what shall be the standard of reasonable returns? Shall it be that of a reasonable return on the original cost of the property with subsequent expenditures for betterments; or upon an inventory of the property in its present condition with its value estimated at the cost to replace it at current prices for materials and wages; or at the current market value of its stock and bonds?

In two leading cases the courts have considered capitalization as the basis of rate-making. In the Minnesota case, the Great Northern Company had applied to the Court for relief from the tariff of rates fixed for its lines in that State by the State Commissioner. The Commissioner had framed a general freight tariff which would produce a reasonable re-

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turn, in his opinion, on the price at which these lines had been sold under foreclosure in 1876, $3,600,000. By 1890 the purchasing company had increased its stock to $20,000,000 and bonded the property for $84,000,000, and had leased it for fixed charges and a guaranteed dividend of six per cent to the Great Northern Company. This company claimed that it was only reasonable that it should be allowed at least to earn its fixed charges on its leased lines. The lower court reversed the Commissioner. The State Supreme Court ordered a new trial, holding that capitalization had no bearing on reasonable rates; that the proper basis for reasonable rates was the present cost of reproduction. This was in 1896.

In 1898 the Houston and Texas Central Railroad Company appealed from certain rates made for it by the Texas Commission and alleged to be based on the cost of reproduction. In this case the United States Supreme Court decided that this was an undervaluation; that in arriving at reasonable rates additional allowance should have been made for the general advance of values in the country, due to the construction of the road, and the consequent value of its long-established business and good-will. In the case of Smith *v.* Ames, the same court recognized, as elements in arriving at the reasonable earnings of a railroad, its original cost of construction, the cost of permanent improvements, the present as compared

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with the original cost, the sum required for operating expenses, its earning capacity under any statutory rates, and the market value of its securities.

If the cost of the property and betterments is to be represented by the current capitalization, that does not recognize the actual investments which may have been lost or scaled down in reorganizations; or the current capitalization may include watered stock not honestly entitled to recognition. If the property is to be valued at what it would cost to replace it at current prices for materials and wages, are we to consider that prices vary greatly at different periods and that on this basis frequent revaluations would be necessary? If we are to resort for values to the stock market, whose prices fluctuate daily, where could we find a less permanent basis? And again, on any accepted basis of valuation of railroad property, at what rate of interest should the reasonable dividend rate be fixed? At the lowest rate at which banking houses will make time loans on good collaterals? The attempt to fix a stable valuation of railroad property as a foundation and the dividend rate as the measure of reasonable returns from transportation charges is as fallacious in theory as it has been proved to be futile in practice.

For the net returns from transportation charges are not solely applied to the payment of dividends and interest. A portion must be set apart for ex-

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traordinary expenses that are required at intervals for the restoration or replacement of deteriorated plant. Another portion must be put aside to pay for betterments of an expensive character, as improved appliances on a large scale for safety, convenience, and economy in transportation; unless the English plan is to be pursued and such improvements are to be provided for by additional capital with a permanent increase of the dividend fund. As an illustration of the fallacious character of the argument that either the capitalization per mile or the rate of dividends is a fair standard of reasonable rates, it need only be shown that the corporations with the heaviest capitalization and the highest dividends have the lowest transportation rates. This is no paradox; it is the logical result of a small rate of profit from an exceedingly large volume of traffic, and if the volume of traffic at such rates should produce net earnings for good dividends, the effect is to attract further investments in the extension or improvement of the public service that the railroad corporation performs.

What is the standard of reasonableness to be applied to a general classified tariff? Let us take as an example the system of trunk-line rates which is in force in the territory north of the Ohio and Potomac rivers. In this region the rates east and west bound are based upon the rates between Chicago and New York.

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Every station in this territory, as far south as Louisville, Kentucky, and northward to Toronto, has its rates fixed at a certain percentage of the Chicago-New York tariffs, based approximately on distance as affected by water competition. This adjustment is the outcome of long experience in rate wars and compromises. The tariffs are in accord with the 'long and short haul clause' of the Interstate Commerce Act, and commerce throughout the whole of the United States east of the Mississippi River to the Atlantic Ocean and the Gulf of Mexico has become adjusted to this system of rates because of its stability and clearness of comprehension. It is no proof that a general tariff adjusted in this manner over a large territory is unreasonable in itself because it has resulted in profitable returns, for the average rate per ton-mile on the tariff to which it is applied is probably much lower than obtains on the general merchandise traffic of any country in Europe.

The amount of capital invested and the rate of return upon the investment have but a remote influence upon the rates of transportation. As a fact, the public is not directly interested in the returns from railroad charges as a whole, but in the charge for each specific service. So long as any specific rate is reasonable in itself, the railroad company has discharged its duty to the person for whom that particular service is performed, and it is not within the

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province of that person to concern himself with the ultimate disposition made of the compensation for performing it. If each specific rate be satisfactory as applied to each specific transaction, the scheme of rates is reasonable in its general application to the whole volume of traffic, and the public welfare has not been injuriously affected by it. Assuming the truth of this proposition, the field of investigation as to the reasonableness of rates should be confined to the reasonableness of each specific rate as applied to each particular transaction. This is the position which the courts have taken in the definition of a just and reasonable rate per se. They have refused to recognize the reasonableness of the returns upon railroad capital as a criterion of the reasonableness of the rates that were to produce it.

The courts cling to the traditional analogy of railway traffic to that of common carriers on turnpikes and incline to the notion of basing rates on cost of service. As this basis is favored by most theorists, it is necessary to enter somewhat fully into a consideration of the elements which enter into the cost of transportation service, and of the effect upon that cost of the varying circumstances and conditions under which the service is performed. The turnpike distinction between highway tolls and carriers' charges was recognized in the early English charter rates and still figures in French railway tariffs. It has its place

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in our own tariffs and also in an analysis of the elements in their composition.

What elements enter into the cost of transportation? What are the factors that incur cost in performing the service? They are two, the plant itself and its application to the purposes of transportation. The cost of the plant may be represented by the capitalization of the railroad corporation. The interest which that amount of capital would earn in the money market is one element in the cost of transportation. In this element is included the necessary expenditures for materials and labor to keep the plant in serviceable condition with an allowance for deterioration as well as for current wear and tear. Another element to be recognized is the expenditure for supplies and labor in the application of the plant to the purposes of transportation. These elements, in their origin, may be assimilated respectively to the construction and maintenance of the turnpike and to the expenditures made by the common carrier.

The cost of transportation may therefore be considered as composed of the following items:

I. The lowest rate of interest at which the capital necessary for the construction of the plant could be borrowed, with the plant itself as a security for the same.

II. The lowest prices at which the materials could be obtained necessary for its preservation in its origi-

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nal serviceable condition, and the lowest wages at which the labor could be obtained for the same end. These are the items of cost in the construction and maintenance of the plant.

III. To these are to be added the lowest prices for supplies and labor in the application of this plant to the purposes of transportation.

These items, in their total, constitute what may be termed the bare cost of transportation. They represent the lowest possible terms on which the service of transportation by rail could be rendered to the public, for they include no profit whatever, not to any one; not to the promoters of the enterprise, for these receive nothing more than the interest on the money borrowed to construct the plant; nor to the employees, for they are supposed to have received nothing more than the pittance necessary for the support of themselves and their families. Both employers and employees must receive any further compensation from an addition to the transportation charges above the bare cost of transportation, from that part of them which yields a profit.

Here is where the question comes in as to what is a reasonable return in the application of rates as a compensation for the service performed. What is a reasonable return to those who have invested in railroad stocks, hoping for some return after the bondholders have received their interest? Are they not reason-

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ably entitled to a greater return than the bank rate of interest on secured loans? This is especially true of the managing owners, the so-called captains of industry, who have likewise directed their energy, experience, and intelligence to the application of millions of capital to this public service. There are other interests that claim an additional return upon their investment. One interest is that of the wage-earners, from the general manager to the track hand, who have put their capital also into the work of transportation — their health and strength, intelligence, experience, some at the risk of their lives. Upon this investment of capital only a mere pittance is included in the bare cost of transportation.

But as their captains are entitled to a fair return above the interest on their investment, so are those who compose the rank and file entitled to a fair return on theirs. For we have to remember that every allowance of an increase of pay above the lowest standard of wages does not come out of the compensation for the bare cost of transportation, but from the additional allowance thereon which represents a fair profit. There is yet another interest to claim a share of this profit: the inventive genius which has made the railroad possible as a new factor in our material civilization; the brains that have devised the many appliances and processes which have increased its efficiency as a transportation machine — the in-

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ventors of air-brakes and automatic couplers and block signals, of powerful locomotives and sleeping-cars and refrigerator cars, of improved processes for making steel rails, for sinking deep foundations, and for excavating tunnels. All these men demand and rightfully claim some part of the return for their services above the bare cost of living.

The profit from the service is therefore that part of the compensation which remains after deducting the bare cost of transportation, and represents something more than the dividend fund. For of this margin of profit, a part is to be distributed among all these men as a fair return on their respective investments of money, labor, experience, and genius; and as this margin is reduced, so is their reward. Reasonable rates based on the cost of transportation should therefore include a margin of profit sufficient for these purposes, and, if this basis be accepted, we have a standard of reasonable rates, that is, as applied to the gross returns from these rates. But how can such a standard be applied to the incidence of compensation for each specific service?

When this stage in the exposition of the theory of rate-making is reached, in the application of general principles to a particular case, the basing of reasonable returns either on capitalization or on cost of transportation is of no value. How is the accepted aggregate of reasonable returns to be applied to each

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of the myriads of transactions represented in that aggregate? At this point the theorist steps aside, and the duty devolves upon the railroad company to fix a specific rate of compensation for each service performed.

Each service performed in transportation is of a twofold character. It is partly receipt and delivery, and partly transmission. The former is irrespective of distance, the latter is not, and the element of cost attaching to receipt and delivery is irrespective of the length of the route over which the service is performed. Therefore, in fixing rates for varying distances, for them to be just and reasonable, one element should be constant and the other variable with the distance. Yet a rate made on this basis might not be a reasonable one, for it would be made solely in the interest of the party performing the service, with no recognition of the interest of the party for whom the service was performed. What has the cost of that service to do with its value to him? What has the cost of anything to do with its value to the purchaser? Its value to him is in his need for it. The maximum charge which he will pay is limited by his desire for it; the minimum price at which it can be furnished is the bare cost of performing the service. Between these limits is to be found the just and reasonable rate. Reasonableness is a balance between conflicting interests or motives, and the interests that conflict

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in the fixing of a freight rate are those of the common carrier and of the shipper; and the just mean would seem to be a rate which recognized equitably the cost to the carrier and the value to the shipper of each specific service.

The making of passage rates is less complex than that of freight rates. Its basis is more clearly referable to the mileage rates of stage-coaches and post-chaises, and passage rates have therefore more closely conformed to simple notions as to proportioning rates to distance and to conveniences furnished in the way of comfort and speed. Such a basis is easily comprehended as just and reasonable, therefore popular opinion has never been sufficiently agitated on the subject of passenger fares to make it a political issue, not even as to pooling passage earnings, which is permissible under the provisions of the Interstate Commerce Act. There is therefore not much to be said as to the difference in the theoretical and the practical views of rate-making on passage traffic, since they are so nearly alike. It is with reference to making rates on freight traffic that opinions diverge.

View this matter as you may, the distinction between competitive and non-competitive business is always in evidence. Rates on non-competitive business are stable because they are not the result of frequent bargains, but conform to an ancient standard in which the rate of compensation included all the

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elements of the cost of service. In this respect local freight rates and passage rates in general are made on the same basis. This basis has long been buried out of sight, but it is still there. It is represented in theoretical rate-making by maximum rates. Travellers in general pay maximum rates because they must travel. Excursionists pay minimum rates because they need not if they do not want to. The local shipper is in the same condition as the ordinary traveller. He *must* ship his products to market or he *must* have his goods for sale. The traveller may have a choice of routes, but the local shipper has none. Maximum rates for him is the unvarying rule.

In all fields of human activity, practice precedes theory; we do things first and reason about them afterward. So it has been with rate-making. Two guiding principles have ever been present in the minds of practical rate-makers; what the traffic will bear and what the shipper will stand. The first principle is applicable to making a local rate, and is a primary feature, not only of rate-making, but of price-making in general. It is the basis of the economic law of supply and demand, but has never secured any very generous recognition from theoretical rate-makers. They criticise this standard for rate-making, because they interpret the rule as meaning *all* that the traffic will bear instead of all that it will *reasonably* bear. This is one of the principles observed

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in making a classification; that articles should be classified according to their relative value. Another principle is a crude recognition of the cost of transportation, as when articles are classified according to their relative bulk for weight. Indeed we may say that there are three principles observed in classification which are also the basis of local rates; that of relative value, that of bulk for weight, and that of inherent qualities, as fragility or of a liquid or of an explosive. Charging what the traffic will bear should be restated as what the traffic will *reasonably* bear, and this proposition is the basis of maximum rates. If the rate leave a disproportionately small profit to the shipper, it is exorbitant; if it absorb *all* of his profit, it is extortionate. Therefore, in making maximum rates, it is the duty of the common carrier who enjoys a franchise for collection of tolls to exact no higher charge than will admit of a fair profit to the person for whom the service is performed. In making this assertion, we must recognize the limitation that the carrier shall not be expected to perform the service at a loss. A reasonable maximum rate is one then that admits of a fair profit to both. A reasonable minimum rate is one which enables the carrier to do business without actual loss. This therefore is the proper relation which should exist between a railroad company and its local shippers in the establishment of just and reasonable rates on the

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basis of what the traffic will bear. An argument in favor of protective tariffs is also favorable to charging what the traffic will bear, inasmuch as the extra charge on the more valuable commodity enables the company to charge proportionately less profit on the cheaper and more necessary commodities, not only to the benefit of the consumers, but also to the greater profit of the capitalists and laborers thus encouraged to engage in the production of such commodities as coal, etc.

The practical rate-maker does not originate or create rates. He cannot tear out the foundations of the system to which business has become accommodated; he can only rebuild parts of the superstructure upon the same foundation. He does nothing ab initio, but with reference to what has been done before. His rate-making must also bear a relation to what is going on around him, or competitive business will leave his line. Other rate-makers are acting independently of him, though not of the basis on which he works. That basis they all have in common. In non-competitive rate-making it is the standard to which they all conform; in competitive rate-making it is the point of common departure.

We have now to consider that other principle which guides the practical rate-maker, and that is, what the shipper will stand. Where there is a conflict of in-

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terests between the local shipper and the railroad company, the local shipper is at a disadvantage; but the shipper is in a different relation to the railroad company when he has a choice of routes. Then he too has a voice in the rate-making, the voice of one of the parties to a contract. For this reason rate-making is assigned to the department whose especial duty is the solicitation of business on which the rate is made to suit the shipper. It is then a matter of driving a bargain, in which the rate charged the local shipper is only recognized as a point of departure and the classified rates as a basis for special rates. Every shipper has at bottom a preference for one particular route at equal rates, and to divert his business from that route the agent of a rival must offer better facilities or better rates. This is where the bargaining begins, and it only ends when the rival bidding for the business stops. This is all that there is to practical rate-making on competitive business. The bidding ceases from one of two causes; either by agreement among the bidders, or because the bidding has reached so low a point that the business is no longer desirable to one of them. Usually this is the most prosperous one, who has least need for it.

We have sought for the measure of reasonableness in non-competitive rates. What is the measure of

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reasonableness in competitive rates? What is the measure of reasonableness in any contract relation? It is the measure of profit reached as a compromise between the conflicting interests, as in any bargain. But, as often happens, there is a third party whose interests are involved in such contracts, who has no voice in making them. From his standpoint the compromise reached may seem *very* unreasonable. This helpless third party is the local shipper. He may see freight passing his station at half the rates that he is paying, which is being hauled twice the distance. This may be merely a sentimental wrong, an injury to his feelings without damage to his pocket; but when he perceives that his long-time customers are leaving him, and he finds that they are offered goods at a near-by station at prices which he cannot afford to accept, he attributes this injury to his business to a difference in freight rates that he naturally looks upon as an unjust and unreasonable discrimination. In this reference to discrimination, I am only referring to discrimination between localities on open, published rates, and not to secret rebates to individuals, which is an entirely different matter.

Under what conditions does discrimination between localities in the matter of freight rates become unjust and unreasonable? We say, primarily when more is charged for the short haul, or, as the Interstate Com-

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merce Act puts it, when the common carrier charges as great or a greater compensation in the aggregate for the transportation of property for a shorter than for a longer distance in the same direction, the shorter being included in the longer distance. This on the face of it would be an unjust exaction if it were simply a toll charged for the use of the highway. To justify the lesser charge for the greater haul, we have to refer to the limitation recognized in the Interstate Commerce Act, 'under substantially similar circumstances and conditions'; and in the application of this phase to each case lies the whole contention as to unjust and unreasonable discrimination in open rates, not only as between local and through rates but also as between competitive centres of trade and between competitive regions of production.

The phrase is 'substantially similar circumstances and conditions,' and there is a distinction between circumstances and conditions. The circumstances, as I take it, relate to the respective environment in any two cases. It is the environment of the competitive shipper which enables him to have a voice in rate-making, to enjoy a contract relation; just as it is the environment of the local shipper which deprives him of the benefit of that relation. In respect to environment, the two classes of shipments are not made under substantially similar circumstances; and it is not an act of injustice to the local shipper if the

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common carrier's rates should discriminate against *his* interests under circumstances which the carrier cannot control. The overruling circumstance in railroad rates is the existence of rival communication by water, and everywhere in our country this circumstance is effective, — along the Atlantic or Pacific coast, on the borders of the Great Lakes and the Erie Canal, in the valley of the Mississippi and its affluents, even as between the opposite coasts of the Atlantic and the Pacific oceans. Wherever this circumstance exerts an influence, the laws are silent.

This is a circumstance of natural environment. There are other circumstances of environment, as where a point not naturally endowed with the advantages of water communication becomes a centre of competition by the construction of a rival route of communication to points of distribution or of production. This is a dissimilarity of circumstances brought about through the intervention of man, and by the same intervention the dissimilarity may be ignored or removed. It may be ignored by agreement between the rival managements, or it may be removed by legislation. Efforts to ignore this dissimilarity of circumstances in their own interests by the railroad corporations, that is by pooling agreements, have been prohibited in the Interstate Commerce Law. The reasonableness of maintaining

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competition at junction points has been strongly contested by the Interstate Commerce Commission as falling outside of the limitations prescribed in the 'long and short haul clause,' because there is not a dissimilarity of *conditions*. This, as I take it, means that the conditions where the dissimilarity of circumstances is artificial are not necessarily conditions dissimilar to those which obtain at adjacent stations, inasmuch as the dissimilarity of environment *can* be controlled. This may be true with respect to certain conditions, but is it true with respect to all conditions?

There is one condition under which such discrimination occurs, through a dissimilarity of circumstances artificially created, which is comparable to that of a naturally dissimilar environment. Where two separate regions ship the same products to the same market by separate roads, there can be no basis for dividing the traffic of the two regions between the two corporations by agreement, and competition will diminish the rates from the separate areas of production to the lowest point compatible with any profit to the corporation operating under the most unfavorable conditions. Other circumstances than that of an artificially created environment and other conditions than that of the power to control this circumstance are also to be recognized in determining what is just or unjust, reasonable or unreasonable, in

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rate-making; as for instance between the different services which a railroad company renders to different shippers, more particularly between competitive and non-competitive shippers.

To assist in distinguishing between the several elements that enter into a non-competitive and a competitive rate, let us take this view of the management of a railroad property. If an operating management should lease a running railroad from its stockholders with the obligation to maintain it in first-class order, it is plain that the stockholders would claim the first element in the rate as their rent, and that the lessee would make no profit out of the next element, the cost of maintenance of the leased property; but that all of his profit would come out of the income after paying the rental and the cost of maintenance. Therefore the earnings from the first volume of traffic would be absorbed by the rental and those from the second volume by the cost of maintenance. The next increment in volume of traffic would necessarily be directed to paying for the labor and supplies required for performing each particular service, and not until that was paid could any portion of the compensation for that service be appropriated by the lessee. From the very last increment in the volume of traffic must also come any increase in wages above the lowest possible cost of living, and also the fund for betterments. Now it is this last increment in the

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volume of traffic that is secured by competition, and, according to the economic law of diminishing returns, this last increment affords the least proportionate profit. On this proposition rests the justice of a discrimination in favor of the application of proportionately lower rates to competitive than to non-competitive business.

The dividend to a railroad company that operates its own property is derived from two of the elements which make up the rate; that is, from the rental value of the property and from the profit above the cost of operation. The revenue which provides the rent comes from the traffic which is non-competitive, and this pays all that it will reasonably bear. The net revenue which comes from the actual operation of the property is that which is left after paying what may be called the running expenses. The revenue from this part of the rent, which is profit, is really the result of the skilfulness of the management in finding new sources of traffic and in applying the ingenuity of mankind in the invention of economic appliances, devices, and processes to the exigencies of its own operations. Only to the result of this skilfulness is due the increase of wages above the minimum cost of living.

As an illustration of these principles in rate-making, we may take the operations of our railroad system as a whole for the year ending June 30, 1903. In that year the system earned in round numbers:

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From passenger service	$422,000,000
From freight service	1,338,000,000
From mail and express	80,000,000
From other sources	60,000,000
Total gross earnings	$1,900,000,000
Operating expenses	1,260,000,000
Net earnings	$640,000,000

These net earnings were devoted as follows:

Taxes	$58,000,000
Interest on funded debt	269,000,000
Dividends	166,000,000
Permanent improvements	42,000,000
	$535,000,000
Surplus	105,000,000
Total	$640,000,000

The total earnings from passenger and freight service amounted to $1,760,000,000. Assuming that all the operating expenses, $1,260,000,000, were paid from this fund, there was left a balance of $500,000,000, and the remaining $140,000,000 of net earnings was derived from other sources.

The total earnings from passenger and freight service were divided respectively 24 per cent and 76 per cent; at the rate of 2.006 cents per passenger-mile and .773 cent per ton-mile. On the same ratio these earnings were devoted as follows:

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	Earnings in Cents	
	Per Passenger-Mile	Per Ton-Mile
Operating expenses	$1.440	$.554
Taxes	0.066	.025
Interest on funded debt	0.307	.118
Dividends	0.190	.073
	$2.003	$.770
Surplus	0.003	.003
Total rate per mile	$2.006	$.773

The entire receipts from passenger and freight service were therefore virtually exhausted when the dividends were paid; and the permanent improvements, $42,000,000, and the reserve fund, $105,000,000, were provided for from other sources.

The contributions to the dividend fund from passenger and freight service respectively may also be determined. The passengers transported during the year numbered 695,000,000, and the average journey of each was 30.1 miles, being at the rate of 60.38 cents for the journey. The cost to the railroad system for each passenger in expenses, taxes, and fixed charges was 1.813 cents per mile or 55.57 cents per journey; so that each contributed, on an average 4.81 cents to the dividend fund for each journey. If therefore the passage rate had been reduced to actual cost, each passenger would have saved less than the cost of a street-car ride for each average journey.

The total tonnage for the year was 639,000,000 tons, on an average haul of 271.16 miles at .773 cent

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per ton-mile; so that the charge on each ton per average haul was at the rate of $2.096 per ton or about 10½ cents per 100 pounds. The profit on this service was .003 cent per ton-mile, and for the average haul per ton, .81 cent, or .04 cent per 100 pounds; therefore, if the average charge for transporting a barrel of flour was 21 cents, the profit would be .08 of a cent, and that would represent the savings to a family on each barrel of flour consumed if it were transported at actual cost. It would seem therefore that, taken as a whole, railroad charges in this country are neither unreasonable in themselves nor do they result in unreasonable profits.

There is another aspect of this subject which should not be overlooked, and that is the effect of additional increments of traffic upon the net earnings of a railroad company. Taking the same traffic statistics of our railroad system for 1903, the volume of traffic can be shown that had to be performed before any profit resulted from such performance:

695,000,000 passengers contributed	$422,000,000
639,000,000 tons of freight contributed	1,338,000,000
Total	$1,760,000,000
Cost of operation	$1,260,000,000
Taxes and interest	327,000,000
Total	$1,587,000,000

On the basis of respective contribution to earnings, the cost of operation required the transportation

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Of 500,826,425 passengers at 60.38 cents per journey to contribute .		$302,400,000
And of 456,393,130 tons of freight at $2.096 per ton to contribute .		957,600,000
To provide for operating expenses of		$1,260,000,000
For taxes and interest, 130,000,000 passengers to contribute . . .	$78,480,000	
And 118,568,700 tons of freight . .	248,520,000	327,000,000
Total		$1,587,000,000

So that, before any contribution was made to the dividend fund, the railroads of this country had to transport 630,826,425 passengers and 574,961,830 tons of freight; and it was only from the last increment of about 64,000,000 passengers and as many tons of freight that the dividend fund was obtained. This statement illustrates the value to a railroad company of additional competitive traffic as a source of profit, at any rate above the cost of the service.

These deductions from the traffic statistics of our railroad system show that the end to be sought in the regulation of rates is not to be attained by a reduction in the general charges, but in an equitable distribution of them, in a shifting of the burden from shoulders that ought not to bear them to those that should. Consequently any reduction of a rate on one commodity or service calls for an addition to the

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rate on some other commodity or service, if the just and reasonable average of rates and profits is to be maintained.

What is the view to be taken of rate-making from the standpoint of the person for whom the service is rendered? It is to his interest that it shall be rendered with safety and despatch and at the least possible cost to him. These conditions are secured to persons who are so situated as to have a choice of routes, limited only by the bare cost of performing each particular service for them, while persons who are not so favorably situated must not only pay a charge sufficient to cover the bare cost of this service, but an additional charge to provide for the rental and cost of maintenance; and it is this element of the charge that is really the bone of contention between local shippers and the railroad managements.

The part of the rate which constitutes the profit above the cost of transportation is fixed by the rate-maker in making maximum rates. In practice he adopts some existing tariff and applies it to his business. If its application to the volume of his traffic does not furnish satisfactory returns, he raises the rates to accomplish this purpose. He does not necessarily advance the rates proportionately as a whole, but adjusts the advance in accordance with what he thinks is the relative desire for the service

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as applied to the transportation of different commodities for different distances, the object being to derive a profit from the sum total of all the transactions sufficient for the requirements of the corporation. Those requirements, however urgent may be the needs of the corporation, however rapacious its demands, are limited by the desires of those who must have the service and by their ability to pay for it.

This is the ultimate basis of maximum rates: a relative shifting of the incidence of rates from those who cannot afford them to those who can, from articles not desired by consumers to those which are desired, from articles in whose value, by reason of great bulk or weight and small prices, the charge for transportation constitutes a large element of cost, to those to which, by reason of their small bulk or weight and large price, an increase in the rate adds but little cost. It is this matter of incidence which determines who *must* pay the maximum rate and who need pay only the minimum rate, and this incidence is greatly affected by dissimilar circumstances of environment and by dissimilar conditions of service. It is a matter not always or altogether to be controlled by the will of the rate-making power, wherever that may rest. For, on a fixed volume of traffic, the rates cannot be increased indefinitely to secure a satisfactory profit. The people must pay the maximum rate for the service essential to their necessities,

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and will pay them for what is only desirable to the point when that desire ceases or where it is no longer profitable to them; a condition is then reached in which the profit to the railroad company also ceases. Therefore the company must keep this point in view, that the charge for transportation must always leave some margin of profit to the user.

This principle comes to the front when it is sought to increase the total revenue by inducing an increase in the volume of traffic. To accomplish this, some industry is selected in which production languishes by reason of its small returns. By decreasing the rates on the products of such an industry, the margin of profit to the producer may be so increased as to stimulate the output; and so long as this special service is performed above its bare cost, there is a continuing increase in the profit derived by the application of special or commodity rates to this class of traffic. Nor is the service performed for the general public thereby unfavorably affected either as to its character or cost. In fact, in the development of such an industry, the public welfare is benefited.

We have here looked upon rate-making as applied to an isolated corporation, to one which has absolute control over the transportation facilities of the region which it serves. But suppose that the line of such a corporation be extended into a region already

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supplied with adequate facilities. How much of the theory of rate-making applies to this change of environment? What are maximum rates under these dissimilar circumstances? Evidently the highest rates which those already enjoying adequate facilities are willing to pay for the alternative service which the intruding corporation proffers. This is that region of substantially dissimilar circumstances referred to in the Interstate Commerce Act, and the intruding corporation must necessarily conform to the dissimilar conditions that preclude rate-making on the theory of maximum rates.

To secure any of this traffic it must at least conform to prevailing conditions as to rates for distance, as to classification, etc., regardless of its previous tariffs. If its management be energetic, it will compete for all the traffic that is offered; if it be prudent, it will set a limit to the price at which it will perform the service. Where shall that limit be set? At what point shall the minimum rates be fixed on competitive traffic? Certainly at the point at which it ceases to be profitable, at the bare cost of transportation. This brings up anew the question as to the bare cost of transportation; whether that cost may vary with the character of the service performed or with dissimilar circumstances and conditions.

If we consider maximum rates as applied to all the traffic of a railroad, we may say that the bare cost

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of transportation will apply primarily to the length of the haul as covering the proportionate investment in roadway, also as covering the wear of rolling stock, the cost of fuel for locomotives, the wages of trainmen, and the cost of train supplies, so far as these items of cost are affected by the length of haul. But there are other items that are independent of the length of haul, that is the cost and maintenance of terminals, and the cost of receiving, loading, unloading, and delivery of freight. These items vary with the terminal conditions and the character of the commodities, without reference to the distance that they are transported. It is this class of constant charges which governs in the diminishing ratio at which rates are increased for distance, in order that the value of the article should not be absorbed in the charge for long hauls.

Both these considerations should govern in fixing rates on competitive traffic, that is, the cost of the service as proportionate to distance and as to terminal cost. The latter class of charges applies clearly to both local and competitive traffic, except so far as they may be affected by the volume of either or by conditions peculiar to either. There is no contention on this point. But the contention arises with respect to those items of cost that are affected by distance, that is, by the 'long and short haul clause' of the Interstate Commerce Act, as applied to transportation

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for a shorter and a longer distance over the same line, in the same direction, the shorter being included within the longer distance.

When the railroad rate-maker is making rates on competitive business, he recognizes the terminal cost, but he discriminates among the items of cost referable to the length of the haul. He recognizes only those applicable to the particular service to which the special rate is to be applied, and ignores all other items that apply to the long haul in a general way. He figures on the car mileage, the cost of maintaining and operating the engine per mile run, the wages of the crew, and the cost of supplies per mile, and, taking these items all together, he determines the cost at so much per train-mile, adds the terminal cost for handling the train load, and thus arrives at the cost of transportation which he applies in fixing the rate per 100 pounds on the train load.

This is in theory the basis of rate-making on competitive traffic from the railroad standpoint; and any business that can be obtained above this basis of rates is considered a source of profit. In the rate-maker's calculations he has ignored the investment in track and buildings, their maintenance and deterioration and the cost of administration. He goes farther in competing for a *car-load* of freight. Here he considers only the car mileage expenses and the cost of handling, for he views the other items of train

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expense as inapplicable to a single car-load. He goes still farther when it is a question of securing a load for a car that would otherwise return empty. Here whatever earnings the rate will procure above the cost of handling he looks upon as profit, which is not surprising; for in 1903 the empty car mileage on our entire system was 4,350,000,000 car miles, about one-half as much as the loaded car mileage.

The railroad rate-maker therefore makes the rates on competitive business according to three dissimilar conditions: first, when he has to furnish an engine and train of cars for it; second, when he has only to provide cars to add to a train that is going anyhow; and third, when he wants freight for empty cars. Under neither of these conditions does he consider that interest on the investment in track and buildings or the general administrative expenses are elements in the cost of doing competitive business. This of course is not true with reference to the large expenditures incurred in providing terminals, second track, and equipment for the competitive traffic of the trunk lines. The interest on such investments and the expense of their maintenance are recognized as charges upon competitive traffic.

The great economies that have been accomplished in diminishing the cost of train service in general are directly applicable to competitive traffic in large volume; for only in a service of this character can

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the economic advantages be fully developed of heavy engines drawing long trains of cars of maximum capacity. These economies enable rates to be lowered on the very cheapest classes of commodities, those which affect most vitally the welfare of the people in general. They permit of a margin of profit from very low rates on such commodities, especially on long hauls without loss of time in the delay of rolling stock and with a small cost for loading and unloading the cars. Such conditions occur most favorably in the carriage of grain from Western centres of concentration to the Atlantic seaboard.

If the rate-maker ignores any apportionment of administrative expenses and any returns upon the general investment in immovable property in estimating the cost of doing competitive business, these items must be provided for in some way out of the traffic, and therefore they must become an element in the maximum rates applied to local traffic.

Where such a discrimination does exist, what are the circumstances or conditions which make this discrimination just or unjust, reasonable or unreasonable? We have already seen that where the circumstances of environment are natural, the competing railroad must conform to them to secure competitive business; and the local shipper cannot claim that any rates on this business are unreasonably low which contribute any profit to the fund from which the

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interest on the investment in property and the cost of maintaining that property are to be paid; for to the extent of that contribution his business is relieved from payment to the same fund.

This proposition assumes another aspect when the dissimilar circumstances are artificial; when the point of competition is a railroad junction which only becomes competitive by the action of two or more corporations. Here it is plainly within their power to regulate the basis of competitive rates at their discretion and to keep them, if they please, in line with the maximum rates on their other traffic. This is what the corporations sought to do through pooling agreements. If this argument be sound, it is unreasonable for a railroad company to accept business at a point of natural competition at or below the cost of the service actually performed, and it is unjust to persons at intermediate stations for two railroad corporations to discriminate in favor of junction points.

Discrimination in favor of certain industries by commodity rates, above the actual cost of the service performed, is justifiable, since the volume of traffic is thereby increased without injustice to the persons furnishing the ordinary traffic. Discrimination in favor of places enjoying natural facilities for transportation is admissible, provided the special rates are not so low as to throw any additional burden

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upon local shippers. Discrimination in favor of junction points is unjust to shippers at intermediate stations. Discrimination in favor of persons is unjust and unreasonable and an abuse of the franchise for collecting tolls.

Pooling associations are conveniently organized for conferences in establishing uniform rates or for similar purposes in connection with competitive traffic, though their specific function is not to make rates, but to maintain existing rates on competitive traffic. In the exercise of this function they have served to hold the rates uniform and stable at all pooled points rather than to advance them; for the dissimilar circumstances and conditions prevailing at those points are generally beyond their control in this respect. Where the pooling associations have been strongest, rates in general have declined in common with rates where the traffic was not pooled, and since the prohibition of pooling, rates have shown no further decline of importance. Pooling associations have also been of service in asserting the claims of rival areas of production to an equitable recognition in a common field of consumption. The demands of manufacturing interests to compete in Southern territory, which had long been purveyed exclusively in the interest of the North Atlantic seaboard, were championed by the Central Traffic Association and resisted by the Southern Railroad and

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Steamship Association, until a compromise border line was established by mutual concessions.

It is the possibility of mutual concessions which preserves the flexibility of rate-making by internal control among railroad corporations. They are interested in securing the highest probable profit from the greatest possible volume of traffic. This purpose, intelligently pursued in rate-making, brings the interests of the common carrier and his customers into accord to the greatest extent practicable, provided that the latter are protected against unjust personal discrimination. It is in the discrimination between areas of production or centres of distribution that the greatest difficulty is to be found in harmonizing their interests. This is the most difficult problem in rate-making, and is the one which even theorists have not been able to solve to their own satisfaction.

Theoretical rate-making has assumed greater practical importance since the question of enlarging the power of the Interstate Commerce Commission has become a political issue, and its relation to practical rate-making problems will be further considered in the succeeding chapters [that is, of Mr. Haines's book on Restrictive Railway Legislation].

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